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DIRECTORATE OF DISTANCE EDUCATION

L A W

B.G.L. SECOND YEAR

DIVISION - II

THE LAW OF PROPERTY AND EASEMENTS

VOLUME - I

LESSONS : 1 TO 5

Madurai Kamaraj University
Madurai - 625 021

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Dear Student,

The Soviets might define property as "theft" but it is the institution of "property" and "ownership of property" which, brought about jealousies between men and it became imperative that a political authority be appointed to control and regulate civil society. This is just to show you how important 'property" is. It has become the very basis of society; its economy, progress, prosperity etc., depends upon it. Right to property is no longer a Fundamental Right under our Constitution. In introducing you this subject, we are introducing you to a proper appreciation of what is meant by Property and how to effect its transfer. In the first lesson we are incorporating the scheme of lessons, a set of Madurai Kamaraj University Question Papers on the Law of Property and Easements and a list of prescribed books. We have divided the syllabus into 10 lessons

Attend the seminars without fail and benefit by direct contact with your teachers

Best Wishes,

STAFF, THE LAW DEPARTMENT.

SCHEME OF LESSONS
THE LAW OF PROPERTY AND EASEMENTS
The Transfer Of Property Act, 1882
(Act IV of 1882)

Lesson No.

1. Codification of Property Law-Nature of property-interest in property - Legal and equitable estates. Subject matter of transfer-Rule in Tulk v Moxhay - Future interest in property - Rule against accumulations - Capacity to transfer - Operation of transfer - Formalities of transfer - Transfer of property - defined - what may be transferred and persons competent to transfer - Oral transfer Restrictions repugnant to interest created- Transfer for benefit of unborn persons.

2. Role against perpetuity - Vested interest-contingent interest and conditional transfer - condition precedent and condition subsequent. Doctrine of election - Apportionment of periodical payments-Burden of obligation imposing restriction on use of land.

3. Transfer of ostensible ownership - Transfer by person having authority to revoke the former transfer - Transfer by unauthorised parsons who subsequently acquire interest in the property transferred - Transfer by one co-owner. Joint transfer-transfer for consideration by person Having distinct interest - Transfer by co-owners of share in common property - Doctrine of Lis pendens - Fraudulent transfer - Doctrine of Part-Performance.

4. Definition of sale - Difference between sale and contract for sale - Rights and liabilities of buyer and seller - Mortgage - Definition - Different types of mortgages.

5. Mortgage when to be assurance - Rights and liabilities of mortgagor - Rights and liabilities of mortgagee.

6. Doctrine of Clog on the equity of redemption- Redemption and mortgagors rights therein - Accession to mortgaged properties - Doctrine of priority - Doctrine of Marshalling and Doctrine of Contribution- Redemption by persons other than the mortgagor - Doctrine of Subrogation - Doctrine of Tacking - Definition of charge - Doctrine of Notice and Tender.

7. Definition of lease, premium and rent. Lease how made and kinds of leases. Distinction between a lease and Licence - Rights and liabilities of the lessor and lessee and Determination of Leases.

8 Definition of Exchange, rights and liabilities of parties - Exchange of money in Indian and English law-Definition of gift-its ingredients. Gift of existing and future property-Gift to several of whom one does not accept-Suspension and revocation of gifts. Onerous gifts-universal donee - Donatio mortis causa and Mohammedan law - Transfer of actionable claims -Transfer of policy of marine insurance.

Indian Easement Act—Act V of 1882

9. Easement generally-Imposition, acquisition and transfer of easement-Incidence and disturbance of easement.

10. Extinction of easement—Suspension of easement—Revival of easement—Licences—Difference between lease and licence with reference to decided cases.

Bare Acts :

1. The Transfer of Property Act, 1882.
2. The Indian Easement Act, 1882.

Books recommended for study

1. The Transfer of Property Act.—Mulla
2. The Transfer of Property Act.—Mitral
3. The Transfer of Property Act.—Krishna Menon
4. The Transfer of Property Act.—G.C.V. SubbaRao

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Lessons Revised by

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Lesson -1

LAW OF PROPERTY

TRANSFER OF PROPERTY ACT (ACT NO. IV OF 1882)
CHAPTER-1 PRELIMINARY

Introduction :

The Transfer of Property Act is not an exhaustive code. it does not deal with all possible kinds of transfers. Firstly, it does not have anything to do with transfers of movable which are governed by Act, such as the Sale of Goods Act Secondly, it does not deal with transfers of all kinds of immovable property. It deals only with transfers inter vivos or by acts of parties. These, transfers inter vivos, are the subject matter of our study and they are of six kinds namely, sales, mortgages, leases exchanges gifts and actionable claims. Transfers can take place also under orders of court.

Thus from the above it is seen that the Transfer of Property Act does not deal with transfers brought about by the laws of insolvency, inheritance and succession, forfeiture and sale in execution of a decree not does it deal with transfers in vogue by virtue of local customs such as Otti, Kanom.

Definition of immovable Property :

Section 3 of the Transfer of Property Act is called the Interpretation Clause. So far as we are concerned it is important for us, in that, it contains definition of "immovable property". The section has defined ' immovable property as property which does not include Standing timber, growing crops or grass" This is a very unsatisfactory definition So we have to go for definition of immovable property in the General Clauses Act, which incidentally is not satisfactory also. All that it says

is "immovable property shall include land benefits to arise out of land and thing attached to the earth" Section 3 (25), General Clauses Act (X of 1897). If I were to say that this definition is exhaustive, it is going to be a gross exaggeration.

Things "attached to the earth" means :

a) Rooted in the earth e g ., trees, shrubs. It should be noted that standing timber is classed as movable property because it is fit for construction. Wood like neem, teak, sandalwood etc, is timber : whereas a fruit bearing tree would not be a standing timber but immovable property. A mango Tree may be both;

b) imbedded in the earth e. g. Walls and buildings

c) attached to what is imbedded in earth for the permanent beneficial enjoyment of that to which it is attached e. g.. doors and windows of a building ; but hot electrical fittings and pictures fixed to the walls. In the case of concealed wires inside the wall it becomes immovable property, if it can be removed, it becomes movable. Similarly a grinding stone fixed to the land may be treated as immovable, but it is agreed to be removed it becomes movable Hence, the test is Whether it can be severed from the earth or not.

"The benefits to arises out of land" are legion. Section 2 (6) of the Registration Act (XVI) of (1908), in its definition of immovable property enumerates some of them thus : 'immovable property includes land buildings, hereditary allowances rights to way, lights, ferries, fisheries or any other benefits to arise out of land things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops, or grass."

So according to the above definition the following are immovable property ;- The equity of redemption in mortgaged property, the interest of the mortgaged immovable property, a

Hindu widow's life-interest in the income of her husband's immovable property, a right to-Collect rent from occupancy ryots in actual possession, a right of ferry, hereditary offices, the right to collect lac from trees or Tendu-leaves. These are some examples.

Conversely the following are not immovable property. A decree for safe of immovable property on a mortgage, rights of purchaser to have the land registered in his name, machinery which is not permanently attached to the earth and which can be removed from one place to another, a right to recover maintenance allowance even though it is charged on immovable property.

TRANSFER OF PEOPERTY BY ACTS OF PARTIES

Section 5 of the Act deals with transfer of property. Under this section "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living person, or to himself and/or, more other living persons and "to transfer property" as to perform such act.

"Living person" will include a company or association or body of individuals, whether incorporated or nor. A living person conveys property, (e.g. sale of house) in present or future to one or more living persons or to himself (e.g. creation of a trust in which he becomes a beneficiary or constitutes himself as a trustee.

Act of parties :

The section contemplates transfers of property by 'act of parties'. So transfers which take place by judicial process is not dealt under the Act, only with such transfers that take place between living persons by virtue of their own voluntary acts- Gopal Pandev V. Parsotam Das. 5 All. 121 (137) A purchase by an auction purchaser in an execution safe is not a transfer to which the Act applies. Wills are also outside the scope of this Act as a will takes effect only on the death of the testator.

Transfers :

The term "transfer" is used to mean all the species of contact which pass real rights in property from one person to another. In Gopal Pandev V. Parsotam Das, Mahmood J. made the following observation : The word has long been recognized to be a technical term of law in all countries where English is the language of the Legislature and of the Courts of Justice. It is often used as a convertible term with 'alienation, conveyance and assignment". But the student should take note of the important fact that the term transfer does not necessarily mean a transfer of the whole of the transferor's interest in the property for instance a mortgage or lease which transfers only an interest in the property is a "transfer" under the Act- Ram Kinkar V. Satya Charan, (1939) 43 C.W.N 281 (P C) A partition therefore, is not a transfer, because it merely effects a change in the mode of enjoyment of property and does constitute an act of conveying property from one living person to another, Indoji Jithaji V. Kothapalli 10 L.W. 498 But the Madras High Court has held a contrary view in Rasa Goundan V- Arunachala 44 M.L.J 513, and Sarin V. AJit Kumar A.I.R. 1966 S.C, 432-

In Basangowda V. Iragowdatti 17 Bom. 597 (603) : where a Hindu widow entered into a compromise with the reversioner to keep the property for her life without alienating it in any way and consented that after her death the reversioner would be the owner of the property; the Bombay High Court held that the compromise was a family arrangement and did not amount to a transfer. In Joti Prasad v. Basdeo A.I.R. 1946 All. 267 a Hindu woman had inherited property from her father. This property with her limited interest of a Hindu widow surrendered her entire estate in such property in favour of her sons so as to be a accelerate their succession to it- This transaction was held to 'transfer' Within the meaning of section of the U.P. Encumbered Estates Act, 1934.

From the above it is clear to us that a family arrangement or compromise by which the antecedent right of the parties is acknowledged and defined will not amount to a transfer of property as no new distinct title is conveyed to either of the parties. As a release deed can only feed title but cannot transfer title, it is not a transfer. It was held in K. Hatachi Gowder v. H. Bheema Gowder A.I.R. 1960 mad .33. Partition is also not a transfer. Held in Sarin V. Ajitikumar (1966) s.c. 432. Likewise a bonafide settlement of doubtful claim is not a transfer.

The creation of an easementi is, not a transfer of property and therefore is not the subject matter of this Act.

Legal and Equitable Estates :

In Ali Hossain V. Rajkumar AI.R. 1943 Cat. 417 (F.B) The court made the following observation: In India there is no such conception as legal estates and equitable estates. All interest in property, whether the full ownership or an interest carved out of full ownership, are rights in-rem, the essence of which is that where right is infringed, the court has no option but to give relief, provided the remedy is invoked within the period of limitation. The Court cannot refuse relief in the exercise of its discretion. In England, two kinds of estates, rights and remedies are reorganized, legal and equitable (Refer to Lessons in Jurisprudence). The differences between the same will become clear as we progress.

"In future" Conveyance of property may be in present or in future but it is essential, the property itself must be in existence, at least potentially as the property of the transferor grantor-Sumsuddin. Abdul 31 B.m. 165.

The Words "in present or in future" govern the word "conveys" and not the Word "property", this means there is nothing in the section to indicate that future property can be conveyed- Chief Controlling Revenue Authority v. Sudarshanam Picture A.I.R, 1968 Mad, 319 (F.B.)] It was held in that case that a

purported transfer of properly, not in existence at the time of the contract, can only operate as a contract to be performed in future In Ditchim v. Miller A.I R. 1931 PC, 203 the Privy Council held that where the estate or interest which a deed of assignment purports to assign has at the date he existence, it is well settled that neither at law nor in equity on the assignment of such an interest operate according to its tenor, the same view has been taken by the Supreme Court in Jogal Kishore Saraf v. Raw Cotton Co. Ltd., A.I.R 1955 S C. 376.

In Ram Sarup v. Mohan Lal. A.I.R. 1924 All. 883 a mortgage of future crops, was held to be recognised and enforced in India as an executory agreement, binding on the parties to the transaction which is not governed by the T.P- Act. or the Contract Act in so far as it is neither a mortgage of immovable property nor a pledge of existing movable property. It is in the nature of an agreement to mortgage movable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable.

In Co-operative Hindustan Bank v. Surendra A.I.R. 1932 Cal. 524 it was observed : A man cannot in equity, any more than at law assign what is not in existence But a man can contract to assign property which is to come into existence in future and when it has come into existence. But a man can contract to assign property which is to come into existence. In future, and when it has come into existence, equity treating as done; that which ought to be done; fastens upon that property and the contract to assign thus become a complete assignment. The equitable title arising in a transaction of kind would, no doubt, not avail against a subsequent transferee for value without notice of that title.

In Karnal Singh v, Kalai mahton [A.I.R. 1955 Pat. 402] it was held that a permanent lease of all trees in the village includes not only the existing trees but also the trees that may come into existence in future.

In English Law, the leading case on the point is Holroyed v. Marshall. A the owner of certain machinery transferred it to be held in trust for H. The subject matter of the transfer was expressed to be certain machinery to be added to the mill. New machinery having been added, the question arose whether it could be claimed by H as against an execution creditor of A. It was held that H obtained an equitable title as soon as new machinery was added to the mill and that it would prevail as against the claims of the execution creditor.

In Tailby v. Official Receiver (1880) 13 A. C. 523 the House of Lords held that an assignment of future book debts passed to the assignee the equitable interest in debts arising after assignment. These case lay down the principle that in England future property may be transferred for consideration in Equity.

"Or to himself" Under the old law, a person could not convey property to himself though he could create a trust in his own favour-he could only transfer property to himself conjointly with another; But the Amending Act of 1929 changed the law by the addition of the words "or to himself". The Report of the Select Committee 929 was we have amended sec. 5 to make it clear that a transfer can be made by a person to himself as for instance by a person making a settlement or trust in which, he constitutes himself a trustee".

Living Persons - includes also Juridical person such as corporation and the like. The second para introduced by the Amending Act of 1929 now expressly provides for this. But in Ramalinga v. Sivachidambara, 42 Mad. 440 and Narasimhaswami v. Venkatalingam A.I.R. 1927 Mad. 636 it was held that a dedication of property to an idol at a temple is not a transfer (gift) to a "living person" so as to attract the provisions of the Transfer of Property Act, but is a gift to God so the requirements of writing and registration do not apply to such a gift. The Privy Council in Pramathanath Mullick v. Pradyumna Mullick A.I.R. 1925 PC 139, held that although an idol is regarded by a fiction of law as a

juristic person clothed for some purposes with the rights of persons yet it is not always a ''living persons"

Unborn persons :

Although the Act deals with transfers made between ''living persons", still an interest may be created in favour of unborn parsons subject to certain restrictions (to be seen under secs. 13, 14 and 20)

Subject Matter of Transfer:

Section 6 of the Act deals with kinds of property that can be transferred. It is a negative section as the student will see. It reads as follows: - "property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the lime being in force".

(a) The change of an heir apparent succeeding to an estate the chance of a relation obtaining a legacy on the death of a kinsman or .any other mere possibility of a like nature cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A right to future maintenance in whatsoever manner arising secured or determined, cannot be transferred.

(f) A mere right to sue cannot be transferred,

(g) A public office cannot be transferred, nor can the salary of public officer, whether before or after it has become payable.

(h) Stipends allowed to military, naval, air force and civil pensioners of the Government and politics pensions cannot be transferred.

(i) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act. 1872, or (3) to a person legally disqualified to be transferee.

(j) Nothing in this section shall be deemed to authorise tenant having an untransferable right of occupancy, th. farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer of lessee.

The section opens with the general rule that: "property of any kind is transferable". The contrary has to be proved by the person urging non-transferability by proving the existence of some law or custom which restricts the right of transfer.

Clause (a) "Chance of an heir apparent"

1. There is a general principle of law: that only present rights can be dealt with as property and not inchoate future rights such as spes successionis. These are neither attachable nor saleable. There are a line of decisions on this point In Amrit Narayan v. GayaSingh-45 Cal 590 (P.C): Manikram v. Ramalinga, 29 Mad.120 and other cases. It has been held the right of a presumptive reversionary heir under the Hindu Law or the bare chance or surviving another and succeeding to his inheritance is no more than a spes successionis or expectancy. A Hindu reversioner has no right or interest in Praesenti in the property which the female owner holds for her life- The light become concrete only on her death; until then it is a mere spes successionis Under the Mohammedan Law also the chance of an heir apparent is nothing more then a spes-Shamsuddin V. Abu..l, 31 Bom. 165.

Under English law the expectancy of an heir apparent is not capable of being made the subject of assignment. In re Parsons KayJ. laid down the law in the following observation. It is indisputable law that no one can have any estate or inter-est; at law or in equity contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life of such person no one can have more than a spes successions an expectation or hope of succeeding to the property'. Such a spes is not assignable at law, but in equity 'future property possibilities and expectances are all assignable must be for value".

2. Transfer of vested interests : a vested interest or a vested remainder is a present interest in property and is transferable. Where by will, life estate, is given to two persons, with the remainder to certain other persons, the interest in the remain-der is not a mere chance or possibility but a vested interest-Kali Prasad V. Ram Eclam A. 1. R. 1937 Pat. 193. If under a settle-ment any interest created is always ready from its commence-ment to its end to come into possession the moment the prior estates come to determine, it is then a vested remainder. Such remainders are not mere spes and are transferable.

3. Contract to transfer right of expectancy : A contract to transfer a spes is invalid. But Clause (a) does not apply to transfers of non-existent or after acquired property, so long as they are not the kinds mentioned in clause (a) These transfers are valid. The transfer would be regarded as to a contract to transfer after the vendor had acquired title and would fasten upon the property as soon as the vendor acquires it.

4. Transfer of expectancy by consent decree or compromise : Even by means of a consent decree a Court cannot allow the transfer of a mere sues. In Bhagvan V. Murnu, 13 I, C. 495 a compromise of a suit was struck between the mortgagee of a widow's estate and the reversioner, that on the death of the widow the property to be divided equally between them. This

was held to be a transfer of an expectancy by the reversioner and therefore invalid under the provisions of clause (a) But the compromise is binding on him and when the succession opens he cannot claim the property in contravention of the compromise. He is estopped from subsequently-claiming as reversioner.

5. "Any other mere possibility of a like nature": These words refer to possibilities of the same category as the chance of an heir apparent or the chance of relation obtaining a legacy. So the chance of receiving a graruitous payment at the discretion of an employer for services being or about to be rendered the right to receive the offerings made at a temple, the right to scavenge are only possibilities and therefore cannot be transferred, attached or sold.

6. Difference between the Indian law and English law: The Indian Law differs from the English Law in that under the former even an agreement to assign a spes successions is a nullity, A contract to assign is as much within the mischief of Sec- 6 (a) of T.P. Act as an actual assignment was decided by the Privy Council in Anand Mohan Gaur V. Mohan 50 Cal. 929 In this case a Hindu Contracted to sell immovable property to which he was then nearest reversionary their expecting upon the death of a widow in possession and to transfer it upon the possession accruing to him. The Privy Council held that the contract was void since sec. 6 (a) prohibits transfer of an expectancy.

Clause (b) Rights of re-entry :

As a right of re-entry always pre-supposes an estate in the person asserting that right, he cannot transfer that right by itself. A lessor reserving a right of re-entry on a .breach of a covenant by the lease cannot transfer that right by itself-Smith v Pankhurst. But a right of re-entry with the reversion also, it transferred is not invalid by reason of this clause-Vagaran v. Rangayangar 15 Mad. 125.

Clause (c) Easement :

From the very definition of an easement: it cannot be transferred apart from the dominant heritage for the benefit of which it exists and it cannot be disannexed from it-Section 4 of the Indian Easements Act (V of 1882) defines easement as "a right which the owner or occupier of a certain land possesses as such for the beneficial enjoyment of the land, to do and continue to do something or to prevent and continue to prevent something being done, or upon or in respect of certain other land, not his own. As an easement is a right ancillary to the enjoyment of the land and cannot be transferred by itself-A release of an easement by the dominant owner infavour of the owner of the servient tenement is valid, for here the easement is not transferred but extinguished.

Clause (d) Interest in Property restricted to personal enjoyment:

The prohibitions contained in this clause and clause (dd) relate only to transfers inter vivos i.e., by act of parties. So it will not apply to a transfer by operation of law i.e.. by sale in execution of a decree. The office of an archaka in a temple or a service tenure cannot be transferred. Seshappa v, Chanyya 37 M L.J. 402. Any such interest if allowed to be transferred will defeat the very object underlying the restrictions and be inconsistent with the intention of its founder. Any contract based on personal considerations e.g. manufacture of salt by the person with whom the contract is made, the interest in the contract cannot be assigned.

A priestly office with emoluments attached to it is inalienable. Any alienation may be declared void even at the insistence of the alienor-Nagendra v. Rabindra A.I.R. 1929 Cal. 490. Priestly offices and right to perform religious worship in a temple or to an idol are interests that cannot be transferred. The right of pre-emption is a purely personal right which cannot be transferred to any one except the owner of the property affected thereby-Jasudin v.Sak haram. 36 Bom. 139.

Clause (dd) Right to receive maintenance :

According to the wording of Clause (dd) since the right to future maintenance in what so ever manner arising, secured or determined cannot be transferred it is immaterial how the right is acquired whether by deed for the first time or not. Ashfqa Md. v. Nazir Banu, A.I.R. 1942 Oudh 410 A-right to future maintenance to attract this clause should be personal as distinguished from heritable. The right of a wife to be maintained by her husband cannot be transferred to another and such a right cannot be attached in execution or a decree.

Where a Mohammedan transferred the whole of his property to his daughter for a certain sum the daughter entering into an 'agreement undertaking to pay a certain sum annually to the father, as long as he lived, is a right which cannot be assigned— Bibi Haih-nan v. Bibi Umadalunnissa A.I.R. 1939 Pat. 506.

So long as a Hindu widow's right to maintenance out of her husbands' estate has not crystallized into a definite sum, is an inchoate right which cannot be transferred- The claim is personal and consequently if she dies pending her suit for maintenance against the estate of her husband in the hands of a coparcener the claim does not survive to her legal personal representative-Muthammal v. Veerargavalu. (1952)2 M.LJ. 344. But wherein a suit for partition a preliminary decree is made for the maintenance of one of the defendants and she dies and there are arrears due to the mother, than her heirs can claim these arrears which have already accrued-Dhanpol v. Krishna Chettiar A.I.R. 1955 Mad 165.

Service tenures are inalienable. Lands granted to a person on,condition that he will perform certain service? in a temple and he and his family will enjoy the lands only so long as he performs those services are not transferable-Anjaneyalu v. Sir. Venugopala 45 Mad. 620.

Clause (e) Mere right to Sue :

A right to sue is not transferable-in Nazir Hassan V. Mutnuzziaman A.I.R. 1925. Oudn 299, it was held that there cannot be a sale of a right to sue for immovable property and such a sale cannot confer on the vendee any title to immovable property.

An action for damages in tort is not transferable. A right to recover mesne profit is a mere right to sue and is not transferable-But where the property itself is sold together with the mesne profits the transfer is valid. Where the properties of a Company, are transferred to C Company during the pendency of a suit by A company for damages for a breach of contract, C company, can proceed with the suit on substitution. New Central Jute Mills Co Ltd. V. Rivers Steam Navigation Co. Ltd A I R. 1959 Cal. 352 Scrutton L.J in Eilis V Tarrington, 1959 1. K.B.399 held, "Where the right but was incident or subsidiary to a right in property, an assignment of the right of action was permissible and did not savour of Champerty or maintenance".

The right to recover an ascertained and definite debt is not a mere right to sue and is transferable. It is an actionable claim The principle is that if a certain sum of money is due from any person, that sum is recoverable on assignment : the right to recover the money is not a mere right to sue and the transfer of such a right does not offend against sections 6 (e) of the T.P. Act. But if that sum is to be, ascertained only on taking accounts is not assignable—Remeshiah V Ramiah A.I.R. 1926 Mad. 417.

The Words "right to sue" not only refer to rights damages arising out of torts, but also include rights arising out of contracts where the right to sue has merged in a decree the right under the decree is assignable.

Clause' (f)-Public Office :

The following public offices have been held to be non-transferable : (a) Office of the archaka of a temple (b) Office of paricharaka in a temple (c) Karaima right in a temple (d) Miras office in a temple (e) Dharmkartaship in a temple (f) Office of Mutawali Sajjadanashin Mahant or Shebait Office of Ghatwal (h) office of Karnam (i) office of Chowkdar.

In Hanmappa v. Hanmantgauda A I.R. 194 Bom. 233 it was held that when one member of a family in accordance with custom, transfers his turn of worship the transaction is valid for the following reasons (1) the office of worship is not a public office as it is capable of being divided whereas public office is indivisible (2) the transaction is valid under Hindu law (3) the transaction is really not a transfer because the office is still retained by the family.

The salary of a public officer, is not transferable under the T. P- Act but under clause (i) of Sec 60 (1) of the Civil Procedure Code it is attachable subject to certain restrictions. In Corporation of Liverpool v. Wright 28 LJ'NS. Ch.'368, it was held where the law assigns fees to an officer, it is for the purpose of up holding the dignity and performing property the duties of that office and the policy of the law will not allow the officer to bargain away those fees to the appointer or to any one else

Clause (g) pensions :

Under this clause stipends allowed to military and civil pensioners of political pensions cannot be transferred. They are also exempt from attachment under sec. 60 (1) (g) of the Code of Civil Procedure.

Clause (h) :

Opposed to the nature of the interest where there is a service inam, a transfer by the inamder is opposed to the very

nature of his interest in the property if he sells the property the can no longer perform the services. So the transfer is invalid-Arjasalu v. Venugopala, 45 Mad 620. Similarly the archakatvam service lands are inalienable but not the crops raised on them.

As to transfer forbidden by law, there is a clear destruction between an agreement which may be forbidden by law and one which is merely declared to be void; in the former the whole transfer should be set aside. This clause applies to such cases and not to cases, Where the restriction on alienation is imposed by an agreement of parties of decree of court e.g., where the object of the lease was to secure higher rent than that allowed by the Rent Act the lease is void as it is intented to defeat the provisions of that Act.

So for as transfers with immoral object are concerned they are held to be void, where house is let for the purpose of a brother, the landlord could not recover rent—courinath v. Madhumani 9 B.L.R App. 37. But the case would be otherwise if the landlord had rented the house to a prostitute in ignorance of her calling and the object for which she wanted the house. A bequest by a Hindu testator made conditional on the continuance of immoral relation between himself and the legatee is void. Tayar ammal v. Sitaramasami 23, Mad. 163.

Clause (i) :

By reason on this clause the interest of an occupancy tenant cannot be transferred If such tenant role's an untransferable right of occupancy he cannot transfer that right out and out by sale; but he can mortgage it. This clause involves only those interests declared unattainable by statutes enacted to regulate the relations between the relations between landlord and tenant interests and restrictions there on created by contract and conferred by decrees are not covered by this clause, In this two cases the party for whose benefit the restriction Is imposed may waive that benefit of the condition, if

he elects to do so by giving his consent to a transfer, and this transfer is a valid transaction.

Persons Competent to Transfer :

Section 7 of the Transfer of 'Property Act deals with persons competent to transfer- The section reads as follows : "Every person competent to contract and entitled to transferrable property or authorized to disposed transferable property not his own is competent to transfer such property either wholly or in part, and either absolutely or conditionally in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force".

Section 7 of the Act should be read with section 11 of the Indian Contract Act which is as follows : 'Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by law to which he is subject".

Minors are not included in the term. "persons disqualified" be transfereees' under clause (h) of section 6 of the Act- There is no section under the Act which disqualifies a minor from being a transferee of property. Section 7 which speaks of persons competent to contract applies only to a 'transferor and does not prevent a minor from being a transferee of property. In Mohori Bibi v. Dharmadas Ghose 30 Cal 589 (P.C.) the Privy Council declared that contracts by minors to be valid does not apply to a transfer in favour of a minor. So a sale lease or mortgage by a minor is void but a sale or mortgage in favour of a minor is perfectly valid though not a lease as both parties to a lease agreement sign the deed of lease, undertaking reciprocal obligations. When a contract has been included by a false representation made by an infant as, to his age he is liable neither in the contract nor in fact as no estoppel can be pleaded against a statute-Ajudhai Prasad v. Chandan La A.I.R. 1937 All 610 In this case two minors borrowed money on mortgage. At the time they were over 18 years but less than 21 years of

age but they were under the guardianship of a guardian, appointed by e Court under the Guardians and Wards Act. It was held that the mortgage could not get a decree on the mortgage. From this it follows that if a Manager of a minor's estate enters into an agreement for the purchase of immovable property, the minor is not bound by the contract, nor can he sue for the specific performance of the contract as there is no mutuality between the minor and vendor Mir Sarwarjan v Fakhruddian 39 Gal. 232 (P.C).

Where a mortgagor alleges that he was a minor on the date the mortgage was executed, the onus of proof is on the minor To prove that he was a minor on that date. Dhanapala v. Goverchand A.I.R. 1938 Mad, 959.

In the case of lunatics, a disposition of property by a lunatic Disduring a lucid interval is held to be valid-qualified proprietors, such as those whose property is under the management of the Court of Wards cannot validly transfer their property. Pardanshin ladies come in for special protection. Their transactions are treated almost on the same footing as incapacitated persons such as minors It is for the other party to the transaction with a pardah lady to show that, the lady understood the nature of the transaction and had independent advice in the matter-31. Kuncilal v. Kamini I.B.L.R. But where a purdah lady is used to conduct her own business, attend Court to give evidence has been going to the Registration office in person to acknowledge her deeds for the purpose of registration, need not be treated as a pardanashin lady, and documents executed by such Ladies need not be looked upon with suspicion - Ismail Messejee v. Haliz 33 Cal. 773 (P.C) To charge a pardanashin woman upon an instrument alleged to have been executed by her, it must be shown by satisfactory evidence that the document was explained to and understood by her-Shambati v. Joga 29 Cal 747 (P.C)., and Furid un-Nissa v. Muktar Ahmad. 47 All. 733 (P.C).

Where person authorised to dispose of transferable property not his own', mentioned in the section include the manager of a Joint Hindu family, guardian under the Guardians and wards Act executor administrator under the Indian succession Act, and Trustee under the Indian Trusts Act. Only such persons can deal with property not their own; because a man has no right to deal with property is not his own. This principle is embodied in the present section In Padma Kumar v. Nanda Padhan. A.I.R. Pat. 1941 P. 219 it was held that a person who has no right at all to present possession cannot make any valid transfer.

Operation of Transfer : (Sec. 8)

Section 8 is concerned with the operation of transfer. Its object is to cut down the length of deeds and to simplify them by doing away the necessity of having to describe the property minutely and the incidents of the property intended to be conveyed. These incidents will be implied and automatically conveyed by this section.

The Section reads as follows "Unless a different intention is expressed or necessarily implied a transfer of property passes forth with to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof".

Such incidents include where the property is land, the easements thereto, the rents and profits thereof accruing after the transfer and all things attached to the earth and; where the property is machinery attached to the earth, the movable parts thereof; and where the property is a house the easements annexed thereto the rent thereof accruing after the transfer and the locks, bars, doors, windows and all other things provided for permanent use therewith and, where the property is a debt or other actionable claim the securities therefore, (except where they are also for other debts or claims not transferred) to the transfer but not arrears of interest accrued before the transfer; and where property

in money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Section 8 does not lay down any rule as to the words that are necessary to effect a transfer. The interest conveyed by a particular deed depends upon its own terms. Transfer by auction sale are not affected by this section.

'Unless a different intention is expressed or implied.- Under this sections unless there is ambiguty of language, an intention reserve a certain right will not be implied. So any such reservation of rights in the transferor must be in unequivocal terms in construing the language, the court must look not only to the form of the language, but its substance and the surrounding circumstances and the acts of the parties since the date of the execution of the deed. To ascertain the rights of the grantee, the language of the instrument and the intention of the parties as well as the estate held by the grantor, have to be taken into consideration-MeghLal v.Rajkumar 34 Cal. 129. If the purchaser of a property refuses to produce the deed of conveyance, it is impossible to ascertain whether a different intention is expressed or necessarily implied and the court will not be entitled to hold that any easement passed by virtue of this section to the purchaser as a legal incident of the property-Wutzler v. Sharpe 15 All. 270 (289).

Transfer passes transferor's entire interest : When a certain property is conveyed it must be taken that all rights that the transferor had over The property are deemed to have passed to the transferor. In Badiaraju v. Yvilipallem : A.I.R. 1939. Mad 802 (803) it was held that where in a sale deed certain specific lands are described as being conveyed without specifying the extent of the interest possessed by the vendor, it must be taken that all the interest which the vendor possessed including the vested interest would pass under the deed. So under the section when the words are clear and unambiguous, no matter who she transferor is or, whether all his interest in the

property is conveyed or not. From this it follows that unless there is an express or implied qualification to the contrary the transferor must have deemed to have conveyed all that he was possessed of in the property assigned. In Mehmood v. Bhikari A.I.R. 1953 All. 705, when an owner of a grove sells it by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land is also conveyed to the vendee, unless it is expressly reserved by him

Legal incidents thereof :

An incident is something appertaining to or passing with or depending on another called principal. e.g., an assignment of the subject-matter of a suit carriers with it the right to continue the suit and consequently The right to be brought on the record as plaintiff. Commercial Bark v. Sabju 24 Mad. 252. A right of property carries with it the right to execute decrees obtained to respect of such property. A convenant of renewal is covenant running with the land. So too right of pre-emption attached to ownership. These are legal incidents of the property and pass along with it. The good will of a trade or business passes with the premises Re David and Mathews' (1899) I Ch. 378. Similarly, 'trademarks and trade names denoting the goods of a particular manufacturer would pass with the sale of the business to which they relate-Singer Manufacturing Co. v. Long, 18 Ch D. 395

Easement annexed thereto :

An easement is a right which the owner of dominant tenement as such has over the property of another. Under section 19 of the Indian Easements Act (V of 1882) an easement passes to the transferee with a dominant heritage. A lease of land to which is attached a right of way the easement is vested in the lessee and his legal representative so long as the lease continues. The easement is extinguished only when either of the heritages is destroyed.

Rents and profits :

It is rents and profits accruing after the transfer, because that which has accrued prior to the date of transfer does not pass with property unless the right is specifically conveyed.

Things attached to the Earth :

Title to trees, crops, shrubs, being rooted to the earth are deemed to be 'attached thereto' so sale of a house and compound would comprise the tress growing crops and shrubs thereon unless they are expressly expected. So for as buildings are concerned, the maxim of English law that quicquid plantatur solo, solo, cedit has very limited application if, India, where ownership of a superstructure may, exist in one person and the ownership of this soil in another. So in Narayan v Jatindra A.I.R 1927 P.C. 135, it was held that in order to make a house erected upon the land as well as the land itself subject to the Government's power of sale for arrears of revenue-special words indicating the intention of Legislature to make the building subject to sale would be necessary. On the sale of a building only, the land on which it stands does not pass-Kaltikar Jute Mills v. Calcutta Match Works, A.I.R. 1958 Pat. 133

The purchaser of lands irrigated by a tank becomes entitled to the use of the water of the tank for the purpose of irrigating the lands. The rights of the grantee of a land to the minerals under ground must depend upon the terms of the deeds by which they are conveyed or reserved.

Sub-soil rights :

In a tenure of land unless an express grant is made no subsoil rights ensure to the tenant, unless he has acquired a right in the sub-soil by grant or by adverse possession, the digging of the sub - soil for conversion into bricks for being taken away is not legal.

Factory means machinery fixed to the earth.

House and its easements :

The transfer of house passed with it the easements annexed to it. A right to use a drain Or passage are incidental to the enjoyments of the house.

Doors. Window, etc :

Doors and windows of a building form part of the immovable property and have no separate existence. Locks' Keys, bars etc; being permanent fixtures. The words "other things provided etc" do not include a right of access by a staircase when the ownership of the staircase itself is not claimed and the right of way by staircase is rot easement of necessity. A house does not include machinery where a business is carried on in the promises and what is conveyed is only the building and not the business prima facie all the purchaser gets are the buildings.

Debt-Securities :

The words used in the section are "debt or other actionable claim," so a mortgage debt does not come under this clause as it is not an actionable claim.

Interest :

On a transfer of bonds, promissory note and other actionable claims, the interest follows the principal passes to the transferee, but the interest will not be allowed when the principal debt has become irrecoverable, for interest is accessory to the principal. When principal is barred by limitation the interest is also barred. Arrears of interests are included in the legal incident of the property in the debt, but they are part of the debt itself and must in the absence of words to the contrary, pass as a matter of course to the transferee along with the transfer of the debt.

ORAL TRANSFER

After the Transfer of Property Act came into force, transfer of immovable property within the Act can be effected only in the manner prescribed by the Act. Consequently if the Act requires a transfer to be effected by means of a registered instrument it cannot be effected in any other manner. But *section 9 of the Act* has adopted it as a general principle that a transfer may be made orally also.

Section 9 reads as follows :

A transfer of properly may be made without writing in every case in which a writing is not expressly required by law' At the outset it should be pointed out that this section does not apply to charges, because the creation of a charge is not a "transfer of property" - Bapurao v. Narayan A.I.R. 1950 Nag. 117 The section says that or a transfer is possible "where writing is not necessary". The question now is what are those transfers that can be effected orally : (i) Fowler v Secretary of State 13 L.W. 230, a relinquishment of surrender by a Government report to the Government of the properties included in his patta. As this is neither a mortgage nor a sale, nor a gift, nor a lease as defined in the Act, requires no writing. A mother may relinquish her interest in the joint family property without a written instrument, or limited owner under Hindu law may surrender her interest by a voluntary act, (ii) Fowlers (Supra) and Broinonath v. Mameshwar 28 C.L.J. 220 a Surrendar of a lease is not a transfer and need not be in writing (iii) Tiruvangadacharair v. Ranganathan, 13 M.L.J. 550-a transfer even of immovable properly made in compromise, of a claim is neither a sale nor a gift nor an exchange and no writing is necessary (iv) Paddy Reddiar v. Kothanda Reddiar A.I.R. 1966 Mad. 419 A partition of joint family property is not an exchange and is not by law required to be in writing (v) Sital Chandra v. Delamey, 20C. W.N. 1158-The creation of an easement is not a transfer, and can therefore be created orally,

(vi) A grant of the usufruct of immovable property requires no writing, (vii) Madampillai v. Padrakali, 45 Mad. 62 (F.B) a grant of land to a wife in lien of future maintenance, is not a sale or gift or exchange, so can be effected orally (viii) a valid charge can be created orally (ix) an agreement to treat a sale as mortgage, needs no writing (x) A charge can be created orally - Kuppuswamy v. Rasappa A.I.R. 1935 Mad 865.

Where writing is necessary :

(a) Sale of immovable property of the value of Rs. 100 or upward - section 54. (b) Sale of a reversion of other intangible thing - section 54 (c) Simple mortgages irrespective of the amount secured - section 58. (d) All other mortgages securing Rs. 100 or upwards-section 59. (e) Leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent-section 123. (h) Transfer of an actionable claim-section 130 (i) Notice of actionable claim-section 131.

Condition Restraining Alienation :

Section 10 of the Act deals with conditions in restraint of alienation The rule is that condition of absolute restraint of alienation is void. This rule is founded on the principle of public policy allowing free circulation and disposition of property- it must be remembered that property is of commercial value and should not be tied down. Alienability is one of the incidents of ownership of property and any restriction on it will be void.

The Section reads as follows :

'Where property is transferred subject to condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lesser or those claiming under him; Provided that property may be transferred to or for the benefit of a woman (not being a Hindu Mohammedan or Buddhist), so that she shall not have

power during her marriage to transfer to charge the same or her beneficial interest therein".

The Courts have always endeavoured to see that this right of alienability is not restrained by any condition. In Anantha v. Naga Muthu 4 Mad. 200, it was observed. It is a general rule of Jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of he grant and as such imperative. There can be no doubt, on general principles, that when property, is transferred absolutely it must be transferred with all its legal incidents which the law annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of essence of the grant.

The principle contained in this section is of universal application and is applied both in Hindu and Muslim laws. Not only the provisions of section 10, but also of section 12 are applicable of all transfers by gift, sale or otherwise. But it must be noted that the section says that an absolute restraint alone is bad, so it follows that as condition imposing a partial restraint is not void -Venkatachalam v. Kabala Murthy A.I.R. 1955 (Mad.) 350. In Khalali Ram v. Ragunath, 3. A.L.J. 621, where one of the terms of a compromise embodied in a decree was that the party of whom a house was conveyed under it was not at liberty to transfer it without the consent and permission of the other party to the compromise and decree, it was held that such a condition was void as being a restraint of alienation and the house could be transferred of that condition.

But restraint on alienation imposed by statute are binding upon all person, for these restraints are imposed be the law for the protection of particular into interests. In such cases the prohibition against transfer being founded upon considerations of public interest must be treated as absolute.

In K. Munisamy V.K. Venkataswamy A.I.R. 2001 Karn 246 held that an absolute to restraint on alienation is repugnant to public policy and would be invalid and unenforceable on general principles of law.

Partial restraint :

Although section 10 makes void all conditions which absolutely restrain the transfer from disposing of the property, it is wholly silent as to the validity of qualified' restraints on alienations. In Renuad v. Gillet L.R.2 (P.C.) a restraint: on alienations for 20 years was held to be invalid. The Privy Council in Mahammad Raza v. Abbas Bandi. A.I.R. 1232 P.C. 158 held that a condition restraining the donee from alienating the property to any person outside the family is not invalid. In Myin. v. Machit A.I.R. 1929 Rang. 226 where the donees promised not to sell or gift or mortgage the property without the knowledge, consent and permission of the donor and that if he did so he would return the property to the donor, it was held that there was no absolute restraint on the power of alienation in Lali Jan v. Mahammad Shafi 33 All. 478, a condition that the donee will not have power to alienate the property during the life time of the donor's grandson is invalid, A provision in a partition deed prohibiting alienations, except with the consent of other co-sharers is repugnant to this section and is therefore invalid : Mudara v. Mutha, A.I.R. 1935 Mad. 33 In Tiruchinopoly Vartaga Sangam Ltd v. Shanmughasundaram A.I.R. 1939 Mad. 769 a partition deed between the father and sons provided that certain residential houses should be held by them as tenants-in-common and they should not be alienated to a stranger to the family but gave a right to sell within the family at a maximum price which was far below the real value of the share of each son. There was no obligation to buy at that price. Held the restriction on alienation, amounted to an absolute restriction and was void under this section. In Rosher v. Rosher, 26 Ch. D. 801 - a condition to self property at a fixed price which is one fifth of the real market value of the estate, was

equivalent to an absolute restraint on sale, and as such void. A condition restraining alienation of the property except to a particular person or persons is void - Toja. Singh v. Moti Singh A.I.R. 1925 Oudh 125. A condition to self property only to one of the owner's brothers is void.

But in Kuldip v. Khetrani 25 Cal 869 :

Where a Hindu widow executed an agreement in favour of her husband's cousin putting an and to a dispute regarding her husband's property, and agreed not to lease the property without their consent, it was held to be only a qualified restraint on alienation and therefore void. A stipulation for preemption is not void if in a partition deed the condition is that if any of the sharers desires to sell his share it shall be sold to whomsoever among the other sharers offers to purchase it and to no other, such a condition is not hit by this section - Parmeswarn Nair v. Janaki Amma.

Restraints on alienation by lessees :

The restraints on leases are excluded from the operation of sections 10 and 12. Such exclusion is based on a principle Section 105 which defines a lease says that "a lease of immovable property is a transfer of allright to enjoy such property. So it is not a transfer of the property itself which is outstanding in the owner the lessor it is therefore permissible for the lessor, even where permanent leases are concerned to fetter the liberty of alienation which the lessee would otherwise get-Subbaraya v Krishna 6. Mad 159. A covenant in a lease forbidding transfer by the lessee is valid and enforceble even when the lessee has not transferred the whole of the property leased but reserved a fraction for himself-Umesh v Kala Chand 34 1C. 616 (Cal).

Restriction repugnant to interest created :

Free enjoyment of property is another important incident of property. Section II recognise this elementary principle that a transferee of property who takes an absolute interest

such as a purchaser or a donee cannot be restrained in his enjoyment or disposition of it by any condition inserted in transfer, such a condition deprives the property of its legal incidents and is inconsistent or repugnant to the main purpose of the transfer. So it is not enforceable.

Section II reads :

"Where, on a transfer of property an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyment by him in a particular manner he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect or a branch thereof".

The second para of the section has been amended by the Amendment Act of 1922. The section applies even if the restriction is for a limited period. The section applies to mortgages and leases as much as to gifts and sales.

Restrictions repugnant to interest created : i) Condition in a sale : Mobram v.. Ajudhia 8 All. 452-A vendor sold a portion of his property to the vendee by a deed of sale. The vendee also agreed by a separate agreement not to collect rents never demand partition of the portion purchased by him, and not to alienate the property by way of mortgage or sale nor exercise any proprietary rights over it. It was held that the covenant violated the principles embodied in sections 10 and 11 and the courts would not enforce such a covenant.

In a absolute sale of property, if the vendor reserves for himself a right to a certain amount out of the profit of the property by way of rent is illegal A condition not to alienate property sold is void.

ii) Restriction as regards succession : Any condition is void which stipulates on an absolute transfer that the property or the death of the vendee or transferee should not pass on to his daughters. Sarajubala v. Jyotoirmoyee, A.I.R. 1931. P.C. 179.

iii) Restraint on partition: a condition in restraint of partition is void even for twenty years.

iv) Restraint on alienation for same period: In Chamar v. Sona, 16 C.W.N. 99, where a widow by deed of family settlement transferred the properties inherited by her from her husband TO HIS reversionary heirs subject to the condition that they should not alienate the property during her life time it was held the condition to be void.

v) Condition as regards residence : When an absolute estate is granted to the grantee, it is a void condition to require him to reside at a particular place.

vi) A condition postponing enjoyment of the property is void. in Official Receiver v. Samundravijayan A.I.R 1939 Mad 509 it was held, where an instrument contains recitals that the donor conveyed the property to the donee with power to enjoy the same with all rights, the intention of the donor is to create an absolute estate and any subsequent words which are repugnant to an absolute title must be ignored. In Lloyd v. Webb. 24 Cal. 44 where the testator left property to his son as a present gift, but enjoyment was postponed after the payment of certain legacies. It was held that the attempted restrictions herein are invalid and must be disregarded.

vii) Condition in gift : an outright gift of the absolute estate in property..If a condition is taken, that on he death of the donee the estate will revert to the donor is repugnant to the absolute estate, as such is ineffective and wholly void- Subramaniam v. Kaur, Ammal A.I.R. 1935. Tr. Coch. 115.

viii) Postponement of enjoyment : Where there is an outright gift but enjoyment to be postponed until the donee

has attained a certain age beyond the period of his majority, such direction is bad and imperative unless the instrument confers an interest in the property upon some person for the intervening period and the donee is entitled to have the property upon some person for the intervening period and the donee is entitled to have the property conveyed to him as soon as he attains majority - Husebhoy V. Ahmedbhoy. But in Profulla v. Jogendra, 9 C.W.F. 528 where the immediate interest for 13 years in certain properties was not to go to his sons, but was to be dealt by the trustees in carrying out certain specific trusts, after which period the properties were to go to the sons absolutely, it was held that this restraint on the enjoyment of the properties was not bad in law.

Test of reasonableness :

In Loknath V. Gunaram kalital A.I.R. (1986) Gau-53. A transferred property to B. B undertook not to alienate the property for 5 years. If with in 5 years. A tenders the price, the property was to be reconveyed to him. This is a reasonably limited restriction on alienation and so it is valid.

Restrictions which are valid :

Those conditions which make an absolute in *Prasimi* incomplete as to any of its legal incidents are void. But those conditions which may be given effect to without in any way detracting from the immediate completeness of the gift or sale etc, the condition as well as the gift, or sale or other transfer are valid. Thus in a gift the reservation for the donor of a portion of the usufruct of the property given if it is not inconsistent with the interest created is not invalid - Fakhir Jahan Begam v. Abdul Ghani 45 I.C. 307. Lall dan v. Md. Shafi 34 All 478. This section applies only where absolute estates are created, of full proprietary right but not usufruct of land for purposes such as maintenance. Thus where on a construction of a partition deed it is found that one of the co-sharers is given only a life interest then a clause restricting alienation is not invalid in law - Sooramma v. Venkaratnam A.I.R.

1952 Mad, 166. In Hobson v. Tullok, (1898) I. Ch. 424 the condition acc mpanying corveyance of a house to the transferee was that the house should be used only for residential purposes. The house was made into a boarding house, held that the convenient not to use the house for any other purpose was not repugnant to the nature of the estate and might be enforced by an injunction. A condition to determine a lease even one given in perpetuity on on-payment of the fixed rent, does not offered his section-Rama Rao V. Timmappa, A.I.R. 1925 Mad. 732.

Second para though amended, virtually keeps the old law Intact. It is based on the observation of Lord Cottenham in the case of Tulk v. Moxhay 2 Ph. 771. In this para affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced which was the ruling in the above case e.g. where person who owns a house and adjoining land and sells the land if covenants with the purchaser to keep a portion of the land vacant for free passage of air and light to his house, such covenant is not Void according to the second para as it is intended for the beneficial enjoyment of the vendor's house and is enforceable against the purchaser but if the covenant is merely an arbitrary condition serving to such purpose is void e.g., covenant that a portion of the land should be converted into a garden, or a second storey building should be built on the land etc is bad. (Tulk v. Moxhay to be discussed in detail later)

But in England Tulk v. Moxhay has bean disappeared. In Hayword v. Eurnstwich Bnilding Society 8 Q.B D. 403 it has been held that except in certain special affirmative convenant cannot be specifically, enforced. In Austerbarry v. Corporation of Oldham (1885) a covenant to spend money on the land was enforced.

Condition making interest determinable insolvency or attempted alienation :

Section 12 contains an exception to the general principle in sections 31 and 32. Section 31 provides that an interest may be

created with the condition that it shall cease to exist on "the happening of an uncertain event: Under section 32 such condition must not be invalid. The illustrations given to section 31 are :

a) A transfers a farm to B for his life, with a provision that in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

b) A transfer a farm to B, provided that, if B shall not go to England within three years after the date of transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Under this section it is perfectly valid to have a devise that the devise will have an absolute interest in property given under a will so long as he resides in the house devised to him- *Ambika v.Sasitara, 22 C.L.J. 61.* In *Venkatrama v. Aiyasami* A.I.R. 1923 Mad 67 property was given to the transferee and to pass to his heirs in the ordinary course of inheritance, but a clause provided that in the event of the transferor's return all the properties will revert to him. This clause was held to be legal and enforceable equally upon the transferee and his heirs Even where an absolute estate is given a condition may be superadded that the estate would be diverted on the happening of a *particular contingency.* The student should have noted by this time that such conditions are *conditions subsequent.*

Section 12 reads :

"Where property transferred is subject to a condition or limitation making any interest therein reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transferor dispose of the same such condition or limitation is void. Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him".

The object of this section is to protect the creditors of the transferee w, would otherwise be prevented from having recourse to the property transferred for satisfaction of their debts. As for as lessors are concerned provisions for forfeiture or re-entry by the landlord is essential.

Under the first para of the section, if the grant is subject to such a condition it will be void and the property will pass to the official assignee in case of insolvency, or to the alienee in case of voluntary alienation; otherwise it is unjust to the creditors who may have made advances on the strength of the property should be deprived of their security on account of a clause in the transfer which none but the grantor and the grantee may know anything about.

Transfer for benefit of unborn Persons :

Section 13 attempts to import into India what in England was known as "the rule in *Whitby v. Mitchell* (1890) 44 Ch.D.85," or "the rule against double possibilities". The principle is that a person disposing of property in the hands of more generations than one. This rule is distinct from the rule against perpetuities. The section reads : Where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property"

Illustration :

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for As second son. The interest so created for the benefit of the eldest son does not take effect. because it does not extend to the whole of A's remaining interest in the property.

The rule Said down in this section is applicable to both movable and immovable property.

In the illustration to the section, the disposition in favour of A's unborn son for life is inoperative, but the trust will take effect. Both in Hindu law and Mohammedan lay settlements in favour of an unborn person can be made provided such a settlement follows upon a settlement in favour of a person in existence - Gulamhosein v. Farmahomed, A.I.R. 1947 Bom. 185.

So we can sum up the rules to be observed in transferring property to an unborn person i.e person who is not even in utero (1) The Transfer cannot be made directly in favour of the unborn person. (2) Till the unborn person comes into existence there should be a transfer in favour of person in existence (3) The entire remaining interest of the transferor after the creation of the prior interest in favour of living person should be given to the unborn person. (4) The transfer should not postpone vesting of property in the unborn donee beyond the attainment of majority.

Lesson - 2

RULE AGAINST PERPETUITY

Rule Against Perpetuity :

Section 14, is as followsl, "No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong".

Illustrations :

(a). A fund is bequeathed to A for his life and after his death to B for his life, and after B's death to such; of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

(b) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's son as shall first attain the age of 25, B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease and the time when either of them will attain 25 necessarily falls within his own lifetime, the bequest is valid.

Perpetuities :

Property cannot be tied up longer than for a life in being and twenty-one years (in England) after. That is a properly is transferred to A and after his death to his son on attainment of age of majority. This is called rule against perpetuities The first

reasoned discussion of the rule is found in Howard v. Duke of Norfolk (1683) 22 E R. 931. The Earl of Arundel had conveyed land to trustees in trust for Henry, his second son and the heirs male of his body. But if Thomas the Earl's eldest son should die without male issue in the lifetime of Henry, or the Earldom should descend upon Henry. Then the trust was to be for Charles, the third son. The question arose whether the gift over to Charles was valid. The interest of Charles was an executory interest which if it took effect was certain to vest within a life in being, namely the lifetime of Henry. Lord Chancellor Nottingham held that the interest of Charles was not too remote since "it was limited upon a contingency to happen in a life". This decision was ultimately upheld by the House of Lords. It settled the point that a future interest might be limited to commence on any contingency which must occur within an existing life.

The next case decided by the House of Lords was Lloyd v Carew (1697) Pra.ch.72 (H.L.). There the devise was to the issues of husband and wife, but if they died without such issues, then the wife's heir should within a year of the death of the survivor of them pay to the husband's heir £ 1,000/. The executory device in favour of the heir was thus limited on two lives in case one a year beyond. In the court of Common Pleas the limitation was held to be void but the decision was reversed by the House of Lords. The perpetuity period was thus extended to 12 months after lives in being.

The next land mark in the development of the rule is the decision in Stephens v. Stephens (1735) 25 E.R. 751. This case decided that to a life or lives in being may be added the period of minority of an infant actually entitled under the instrument by which the executory interest was conferred. The decision was justified on the ground that "the power of alienation will not be restrained longer than the law could restrain it, namely, during the infancy of the first taker, which cannot be said to extend to a perpetuity".

The rule took its final shape in the decision of the House of Lords in *Cadell v Palmer* (1933) I.C.I. & Fin 372-8 E.R 956 H.L. on the ground that "the power of alienation will not be restrained longer than the law could restrain it namely during the infancy of the first taker, which cannot he said to extend to a perpetuity".

The rule took is final shape in the decision of the House of Lords in Cadell v Pajmer in that case land was devised to trustee in trust for a term of 120 year if 28 named persons or any of them should so long live and from the expiration or earlier determination of that term for a further period of 21 years and after the end of both terms on trust for persons to be they ascertained. The testator besides employing an ingenious machinery for securing the longest "life in being" by taking the survivor of 28 persons as the "life in being" for the purpose of the rule treated the additional period of 21 years as a term in gross independent of minority of the particular persons interested in the estate. The question arose whether the period of 21 years could be taken as a term in gross On the reasoning in Stephens v. Stephens permitting the postponement of vesting till the beneficiary attained 21 only on the ground that the property was not thereby rendered inalienable for any longer period than would any how have been the case under law, the attempt to treat 21 years as a term in gross should have been disallowed. But in Lloyd v Carew House of Lords had already countenanced the addition of a year to lives in being irrespective of the beneficiary's infancy So it was decided that lives in being and 21 years thereafter is a term in gross fixed the period of perpetuity.

In this way the Modern rule against perpetuity was evolved in England by means of judicial decisions.

English and Indian law compared :

In English law the vesting of property might be postponed for any number of lives in being and an additional term

of 2 years, afterwards and for as many months, in addition as are equal to the ordinary period of gestation should gestation exist and the additional term of 21 years might be independent of the minority of any person to be entitled (i.e., irrespective of the fact whether such person is a minor or not). But Indian law allows the vesting to be delayed beyond the lifetime of persons in being for the period only of the minority of some persons born in their lifetime : the addition of an absolute period of 21 years has not been adopted by this section. So whereas under the English law the additional period allowed after lives in being is a term of twenty one years in gross without reference to the infancy of any person, under Indian law, the term is the period of minority of the person or whom if he attains full age the thing bequeathed is to belong at 21 if he has guardian appointed by the Court, at 18 in other cases.

The Law of Property Act, 1925, by Sec. 163 has validated certain remote gifts by allowing the substitution of the age of 21 years when the gift is to fall for remoteness on the ground that the ascertainment of the beneficiary or class of beneficiaries is made to depend on the attainment by the beneficiaries members of the class of and age exceeding 21 years. There is no corresponding provision under the Indian Law.

This section which embodies the rule against perpetuity relates to both movables and immovables and it applies only when there is a transfer of an interest As the creation of charge does not amount to a transfer of any interest this section does not apply where charges over property are created Likewise gifts to charities, do not fall under this rule.

Where a particular interest is stated to be in favour of a particular person for generation to generation, e.g. a bequest is made to A to be held by him for life after his death to his eldest son for life then to his son ad nauseam it is a perpetuity and as such offends this section. If the devise is to the effect, that 'my remaining movable property shall be deal with by my son G..... and when the sons of my son G shall attain the age of 21

years the same shall be divided and duly received by G and his sons in equal share , confers an absolute gift in G but the gift over is void - Anandrao v. Administrator - General 20 Cal. 450.

An indemnity bond making, a certain property permanently liable to a purchaser and his assignee as surety in case the purchaser is deprived of the possession of the property sold to him is unenforceable the rule against perpetuities-Natesa v. Gopalasmi A.I.R. 1928 Mad. 894.

An agreement by the vendee to recover the property to the vendor on payment of the purchase price paid by the vendee with interest on any day, held that the agreement did not offend the rule of perpetuties. Arjuna v. Lakshmi Ammal A.I.R. 1949 Mad 262. But where a testator by a codicil directs that the devisee under his will should get vested interest in the properties devised to them only on attainment of the age of 24 years, it was held the provision was void for remoteness.

The test to determine whether the transfer falls within the rule is not whether the vesting in a particular case actually took place within the lives in being and 18 years, after, but it is whether the disposition is such that the vesting of property in the vendee might have been postponed beyond the period laid down in section 14. Mere personal convents are not hit by the rule. In Walsh v. Secretary of State 10 H.L.C. 367. a covenant to do any act (e.g. to pay money) is not void for the reason that time for the performance of the act does not fall within the period allowed by the rule not is personal covenant to convey land hit by the rule, therefore a covenant for pre-emption by compromises in respect of land is not affected by this rule.

So a distinction should be drawn between personal covenants and convenants running with the land. The former even when they the relate to immovable property are merely personal which bind only reparties themselves, but not their heirs and assigns. Whereas the latter create interest in land and are

binding not only the parties but also their heirs and assigns. The rule of perpetuity is not obnoxious to the former, but hit and invalidated the latter, because as the heirs and assignees are bound the time for performance may go beyond the statutory limit of time fixed by section 14 In London and South Western Railway Co v. Gomm. (1882) 20 Ch. D. 562 a railway company sold land and the vendee covenanted on behalf of himself, his heirs, assigns and all those who may have interest therein; that the vendor had the option at any time to buy back the land, It was held the convenant for repurchase, creating an interest in the land in perpetuity without any definite limit as to the period of time within which the convenant was to have effect could not be enforced. A covenant of pre-emption, its *exercise not meant to extent beyond a lifetime is valid.*

Covenant of redemption in Mortgage :

The rule against perpetuity applies only where new interest in immovable property are contemplated to be created after the period fixed by the rule expires. In a mortgage there is no question of any future interest in property being created or contemplated to be created, because it is of the very essence of a mortgage that the equity of redemption is a present interest in property. So a stipulation "wherever the party likes he has the right to redeem" is not hit by the rule against perpetuity - *Padmanaba v. Sitaram;* 54 M.L.J. 96.

Covenants in leases :

The rule does not apply to covenants for perpetual renewal of leases. A clause entitling the lessor to terminate the lease at any time is not bad for remoteness. The rule against perpetuities is directed against the creation of Interest in land which will not have effect within a certain period- Johesp Canbra v Asaba 44 CL.J.220 But in a permanent-lease to have a Convenant that the lessee or his personal representative in case they intend to transfer the whole or a portion of the leasehold interest, the transfer would be made in favour of the lessor or

third party with the permission of the lessor for a proper price and that any trans. r in contravention of this covenant would be in valid, is void as offending the rule against perpetuities - Swarna Kumar v. Proplad Chandra 26 C.W.N.874.

Transfer to a Class (Section-15) :

Has been an amended by the Amendment Act of 1929. The amended section reads as follows:

"If on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails in regard to these persons only and not in regard to the whole class". The old section was that the interest fails as regards the whole class".

The old section was based on the English rule Leeke v. Robinson (1817) 2 Mer. 363 that a gift to a class which was void as to any member of that class, by reason of being too remove must fail altogether.

But in Hindu law in case of Hindus, when a gift is made to a class of persons consisting of children or descendants, some of whom cannot take the testator may be considered to have a primary and a secondary intention His primary intention is that all members of the class shall take, those who can, shall do so, the rule being that those members to the class take who are at the testator's death capable of taking - *Bhagabah v. Kalicharan* 132 Cal. 992 F B. This rule was affirmed by the Privy Council in *Radha Prasad v. Ranimari* 41 Cal. 1007 (P.C)

The amendment has been carried to give effect to this rule of Hindu law and the amended section lays down that the transfer will not fail with regard to the whole class but may with regard to those who cannot take as a "class; a class of persons will be all those who shall come within a certain, category or description defined by general or collective formula e.g. who can be designated as "children" "grand children"

"nephews", but in legal language the term 'class has a wider connotation, and "class" depends more upon the mode of the gift itself, namely, that it is an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time and who are to share equally the gift and the amount dependent upon the ultimate number of persons There can be a "composite class", such as a gift is made To the children of A and the children of B.

Transfer to take effect on failure of prior Interest :

Section 16 is as follows "where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails', (the words in Italics were added by the Amendment Act, 1929)

This section is based on the English rule the limitations under void limitations are themselves void. In Money penny v. Derriug 2 Deg. M&G. 145, there was gift by will to A for life, and after his death to the first son of A for life, and to the first son of A's first son, and in default of such son to B for life". It was held that the gift to A's grandson was void and so the subsequent gift to B failed. In Girjesh v. Data Din A.I.R. 1934 Oudh 35 F.B) One S gave away property to R for life and after his death if there be any male descendants, whether born of son or daughter, to them absolutely If R would have only daughter they were to have no power of transfer. In the absence of any issues male or female, living at the time of her death the gifted property was not in any way to devolve upon her husband on his family, but it was to go to D father of R It was held in this case that the gift in favour of D was dependent upon the failure of the prior interest in favour of the daughters and the result was that the in gift favour of D also failed.

But a gift framed in the alternative, one too remote and the other can take effect, the court will disregard the former and give effect to the latter. In Weston v. Yong 28 Ch. D. 436, a gift over is made of property in the event of there never being a child of A, or in the event of no child attaining majority. Here the first contingency is valid, but the second too remove (but the gift over will take effect on the happening of the former event)

Direction for Accumulation - Section 17 is as fellows :

1) where the terms of a transfer of property, direct that the income arising from the property shall be accumulated either wholly or in part a period longer than.

a) the life of the transferor or

b) a period of eighteen years from the date of the transfer.

Such direction shall, save as herein after provided, be void to -the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income there of shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

2) This section shall not effect any directions for accumulations for the purpose of :

i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

ii) the provision of portions for children or remoter issue of the transferor or of any, other person taking any, interest under the transfer, or

iii) the preservation of maintenance of the property transferred and such direction may be made accordingly.

The object of this section is to fix a time-limit for accumulation for otherwise it would create hardship to heirs and descendants and property be locked up for long periods. Independently of this section a direction for accumulation may be void.

Period of accumulation :

Clauses (a) and (b) of subsection (1) are in the alternative a direction for accumulation, can validly be given either for the one period or the other, the two periods cannot be combined. But the direction can be in following form; "either during the life time of transferor or during a period of eighteen years from the date of the transfer, whichever is longer".

If the accumulation is for 25 years from The date of transfer the direction is valid in any case upto 18 years from the date of the transfer. (If the period exceeds that permitted by this section the direction for accumulation is not altogether void, only the excessive period of void taking into account the longer of the two periods mentioned in this section). It may be valid for the entire period of 25 years if the transfor or dies more then 25 years after the date of transfer.

So far as sub-section (2) the direction for accumulations for the three purposes specified, are not hit by sub section (1) under Hindu law a duration for accumulation for the purpose of providing for marriage expenses of the testator's son was valid. So the direction to accumulate the surplus income till it amounted to Rs. 1.00,000 and to use it to feed the poor, was held valid in Hindu Vaw Rajendra Lal v. Rajkumari, 34 Cal. 5.

TRANSFER IN PERPETUITY FOR BENEFIT OF PUBLIC

Section 18 Lays down :

The restrictions in sections 14. 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public advancement or religion knowledge, commerce, health, safety or any other object beneficial to mankind. The restric-

tions contained in section 17 as to accumulation should not apply to charities- But whether a particular charity is for the benefit of the public or not is a question of fact,

In Fatma Bibi v Advocate General 6 Bom. 42 :

It was held that both Hindu law and Mohammedan law sanction gifts for the benefit of the public e.g, for charitable and religious purposes and these gifts are exempt from the rule against perpetuities.

The following are religious and charitable gifts :

1. Wakf or endowment to charitable and religious e.g. uses helping tazies in the month of Mohurram 2. Gifts of property to idol or temple or maintenance of priests 3. Dedication of property to a dharmasia 4. A bequest for giving feasts to Brahmins 5. Gifts for building a public well worn cisterna or water for animals to drink 6. Gifts for building a hospital or school.

The following are not gifts for purposes:

(a) Trust for the benefit of an individual, (b) Gifts fur the repair of a private tomb or monument.

Trust for the spread of Hinduism has been held to be 100 vague but that for the spread of Sanskrit language is valid -Venkata v. Subba Rao A.I.R. 1923 Mad. 376.

We have already discussed the various rules affecting future estate What about the types of estates which can arise in uture English law recognised three types of future estates. 1) Reversion, (2) Remainder and (3) Executory interests.

A *reversion* is the residue that is left in the owner when he has conveyed away a smaller interest than he had, On determination of the smaller interest, that interest conveyed will revert to the grantor i.e.,.. A, the owner, grants an interest or estate to B for life without disposing of the ownersip or fee simple. What remains in A is the reversion, and the land re-

verts to A on B's death. A grants a lease of land to B for a term. What remains in A is the reversion. The land reverts to A on the termination of the lease. A remainder comes into existence when a particular estate is given to one and what is left is totally exhausted by grant to various persons in succession. These persons in succession are Said to take remainders, i.e., that which is covered out of the whole; for example. A an owner of property, gives the property to B for life, and after B's death to C. and his heirs. C gets a remainder.

In this lesson we are to study remainders, and their two types vested and contingent. Redcliffe, the author of Real Property Law, has explained that the term vested has two meanings and therefore used in two senses. It may mean vested in possession or vested' in interest. A right is said to be vested in possession when it is a right to *present* possession of property; it is said to be, vested *in interest* when it is not a right to the present possession, but a present right to a *future* possession; for example, if A gives property to B for life with remainder to C, then B's right is vested-in possession, while C's is only vested in *interest*. As C's right is not subject to any uncertain condition it is vested but it will come into possession after B's life interest comes to an end it : is sure to come as the remainder is already vested in C even during B's life time. But possession and enjoyment alone is postponed. Both interests commence at one and the same time when the grant takes effect. So the interests of both are heritable end transferable. But the effect of the grants will-be otherwise, if the grants were to say, that C should be alive at The time of B's death to get the remainder, for this is an uncertain condition. Which-may or may not be fulfilled and until B dies there is no certainly as to the vesting of the remainder in C. Section 24 makes this clear.

Section 24 reads thus :

Where on a transfer of property an interest therein is to accrue on such of certain persons as shall be surviving at some period but the exact period is not specified the interest shall go

to such of them as shall be alive, when the intermediate or precedent interest cases, to exist, unless contrary intention appears from the terms of the transfer.

A transfers property to B for life, and after his death to C and D equally to be divided between them, or the survivor of them C dies during the life of B. D, Survives B, At B's death property passes to D.

In this *illustration* to section 24, it is to be noted that not only possession of the remainders are postponed but the very commencement of it is postponed. Such an interest (remainders) is not vested interest but is regarded as contingent Where such a contingent interest is concerned, it is neither inheritable nor, transferable until the condition mentioned in the future happens When the condition happens, the contingent interest becomes vested interest. So you will note that in a contingent interest there is a possibility of the event not happening at all Supposing property is given to A and afterwards to B if he marries C, but if when A dies B is not married to C, the rule is then B's contingent interest is extinguished The rules mentioned in the above paragraph are stated in Sections 19 and 21.

Section 19 Says :

"Where on a transfer of property, an interest, therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen such interest is vested, unless a contrary intention appears from the terms of the transfer.

A Vested interest is not defeated by the death of the transferce before he obtains possession.

Explanation :

An intention that an interest shall not be vested is not to be inferred merely from a provision where by the enjoyment thereof

is postponed, or whereby a prior interest in the same property is given or reserved to some other person or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

Section 21 reads:

"Where, on a transfer of property an interest therein created in favour of a person to take yet on fact on the happening of a specified uncertain event or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. *Such interest becomes a vested interest in the former case on the happening of the event, in the latter, when the happening of the event becomes impossible.*

Exception :

Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transfer also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income, or so much thereof as may be necessary to be applied for his benefits; such interest is not contingent".

Analysing these two sections, viz., section 19 and 21 it will be found that the former says what is a vested interest and the latter explains a contingent interest. Section 19 does not define 'vested interest' but merely lay down a rule of interpretation as to kind of interest created by a transfer. The section says that when a property is transferred and an interest is vested *unless a contrary intention appears* from the terms of the transfer. It must be noted that it will still be a vested interest even if the transfer deed (1) does not mention that interest in favour of the transfer or is to take effect forthwith (vested in interest), or (2) that it is to take effect immediately (vested in possession, or (3) that such interest is to take effect on the happening of an event which must happen e.g., A transfers property to B for life and then to C.

If however, a contrary intention appears from the terms of the transfer that the interest should not vest then it is not a vested interest. But explanation to the section says, that contrary intention is not to be spelt out merely from a provision :- 1) Where by the enjoyment of the property is postponed. (2) Where by a prior interest in the same property is created in favour of another person, e.g., A given property to B for life and then, to C. Here possession is postponed during the intervention of a prior interest in favour of B, but nevertheless C gets a vested interest and vesting is not postponed until after B's death : (3) Whereby income arising from the property is directed to be accumulated (4) Where by it is provided that the interest would pass to another person on the happening of a particular event.

An illustration will be, where A gives property to B but provides that if a son is born to C the property will pass to C. As the grant stands B's interest is vested, although there is a likelihood of its being divested on the happening of a specified uncertain event in this case the birth of a son to C.

Section 21 as already mentioned deals with contingent interests or estates. Here a future interest is said to be contingent when in addition to the vacancy of possession some contingency must happen before the person is qualified to take possession. To illustrate :- Property is transferred to X. In case A, B and C shall all die under the age of 18 until all three die under the age of 18 the interest of X is contingent. So from all this it must now be clear that an interest is said to be contingent when some contingency must happen before the person is qualified to take possession.

The exception (noted above) to this section states that an interest cannot be said to be contingent merely from the fact that the person becomes entitled to the interest upon attaining a particular age when at the same time (a) the income arising from such interest is given to him absolutely till he

reaches that age, or (b) the income or so much interest as may be necessary is directed to be applied for his benefit.

To illustrate this :

a) X transfers to Y Rs 100 a year upon his attaining the age of 18, and directs that the interest shall be applied for his benefit until he reaches that age, The interest is vested b) A transfers to B Rs 100 when he shall attain the age of 18 and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age The interest is contingent.

For further illustrations of vested and contingent interests the student is directed to refer to illustrations given in the Transfer of Property Act and the Indian Succession Act.

When a grant to A for life afterwards to his unborn son is made, the moment the son is born he gets a vested interest. Section 20 embodies the rule as follow : 'Where on a transfer of property, an interest there is created for the benefit of a person not than living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest although he may not be entitled to the enjoyment thereof immediately on his birth".

In the illustration given above it matters not that he is not entitled to possession during the lifetime of his father. Nor will the vesting be affected by provision that if his parent dies during his minority the trustees should not deliver possession to him until he attains majority. But on the other hand if the grant is to A and on his death to his son on attaining the age of eighteen, the son gets a vested interest (in interest) when he attains that age. But until he attains that age, he has only a Contingent interest. A contingent Interest becomes vested when the condition is satisfied. In this illustration a contrary intention has appeared' in the terms of the grant.

Conditions of the above nature must be satisfied before the previous estate comes to an end.

Section 23 is to that effect which runs as follows: "Where on a transfer of property an interest therein is to accrue to a specified person if a specified uncertain event shall happen and no time mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as the intermediate or precedent interest ceases to exist"

Where a subsequent contingent interest is created to follow a prior interest, the contingent interest cannot vest until the even on which it is contingent happens and that is based on a sound principle because in that event happening only after the prior interest has determined there is a gap or interval during which the estate would be in susperise and would be res nullias.

Illustration: 1) A gift for life to A, and then to B in case B gets called to the Bar, the gift to B fails unless he is called to the Bar in the lifetime of A or at the sametime as A dies.

2) A legacy is bequeathed to A, and in case of his death to B. If A survives the testator, the legacy to B does not take effect.

The rule in this section corresponds to the English Real Property Rule that every contingent remainder must vest during the continuance of the particular estate which supports it or so instanti that such particular estate determines. Therefore, the object of section 23, is seen to be that at all time property must vest in some particular person or other. It should never be without an owner.

In Narendra v. Kamalbasini : 23 Cal. 563 (P.C) a Hindu at his death left 3 sons, the eldest of full age and other two minors. In his will he provided: "My 3 sons shall be entitled to enjoy the movable and immovable properties left by me equally. If any of the sons dying sonless, the surviving sons shall be entitled to all the properties equally". The Privy Council held that this direction in the will gave legacy to the survivors contingent on the happening of specified uncertain event which had

not happened before the period of distribution, that is, the testator's death. Therefore the egacy to the surviving brothers could not take effect and the original gift to the testator's sons was absolute to each in equal shares and indefeasible on his death.

English Law :

The old law which is the source of section 23 T.P. Act was that there should be no gap in the seisin and when there was a gap the property reverted to the donor. In 1877 a Special Act called. The Contingent Remainders Act, 1877, was passed to prevent such failure, by providing that in such cases if the transfer did not offend the rule of perpetuity it should be regarded as valid. Suppose A transfers property under English Law, to B for life and after his death to his son on attaining twenty one, the transfer to the son is good even if he is not ready to take; being under twenty one at B's death. Even if he is only one year old, it is good because it came within the rule of perpetuity which allows twenty one years after the death of the life in being But if the property is to go the son at twenty five will be void even if he was twenty four at the death of A, and there was only one year for him to wait.

The Real Property Act of 1925 made important changes, and it affected contingent; remainders also. It converted all future, interest into equitable interests with the legal ownership of the land out of which these interests are created vesting in trustees, the 'no gap' rule has thus ceased to plague contingent remainders e.g., land is given to A in trust for B for life and after B's death in trust to B's son on attaining majority, the legal owner is A, land therefore even if the son is under twenty one when B dies here is no danger of the free hold being in abeyance for that is vested in A. This means, that all future interests can now be created only as future trusts.

An important point to be noted where section 23 of T.P Act is concerned is that if a time is specified for the fulfillment

of the condition, there is no lapse; e.g. A for life and afterwards to B if he marries within five years from the date of transfer. Here if A were to die within two years of the transfer and B is not married. He can want another three years to perform the condition and take the property. In the interval the property will revert to the transferor.

Under English law a contingent remainder is neither transferable nor heritable. Indian Law allows the transfer of contingent remainders so long as they do not fall within the prohibitions of Sections 6 against possibilities, because "a contingent remainder is quite different from a mere possibility of a like nature of an heir apparent succeeding to the estate,' or the chance of a relation obtaining a legacy, and also something quite different from a mere right to sue. It is a well understood from the property ..... in respect of which it is quite possible to raise money or to dispose of in any way that the beneficiary chooses'. Ma Yait v. The Official Assignee.

Now, let us look at Section 22. It deals with transfers to a class with a conditions to be fulfilled by the members of the class It reads as follows. "Where on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any of the member of the class who has not attained that age".

The principle of section, 23 is now applied to a class in section 22, suppose property is given to A for life with remander to his sons on attaining eighteen : the sons form a class, and in such a case only those sons who are eighteen or over at the time of A's death with be entitled to the property. The bequest fails in respect to the others, nor are they entitled to get anything when they attain the age of eighteen. But it must be noted section 22 will not apply to a case where the intention is clear that the property to be divided among all the children when they attain majority; for such a gift is not a contingent gift, for what is postponed is only the division or the enjoyment of the property'.

It is worth while to note a few important points of difference between these two kinds of interests:- 1. A vested interest does not depend upon the fulfillment of any condition; it creates out immediate right though the enjoyment may be postponed to a future date. But a contingent interest is solely dependent upon the fulfillment of the condition the interest may fail through 2. A vested interest is not defeated by the death of the transferee before he obtains possession. But contingent interest cannot take effect on the event of the transferee's death before the fulfillment of the condition. It may however ripen into a vested interest on the fulfillment of the contingency 3. A vested interest is transferable as well as heritable, but a contingent interest is not sot. If the transferee of vested interest dies before actual enjoyment it will pass on to his heirs. But that is not the case with a contingent interest. 4. In a vested interest there is a present immediate right even when its enjoyment is postponed. In a contingent interest there is no present right; there is a more promise for giving one and promise may be nullified by the failure of the condition.

One question whether particular words convey a vested or contingent interest is often a question of construction of the instrument.

Conditional Transfers :

Sections 25 to 34 deal with conditional transfers. Conditions may be either conditions precedent or conditions subsequent. A condition precedent is one which must happen before an estate can commence whereas a condition subsequent is one by the happening of which an existing estate comes to an end.

Section 25 says :

"An interest created on a transfer of property and dependent upon a condition fails if the fulfillment of the condition is impossible, or is forbidden by law, or is of such a

nature that if permitted, it would defeat the provisions of any law, or is fraudulent or involves or implies injury to the person or property of another". Illustrations to the section are:- (a) A lets a farm to B on condition that he shall walk hundred miles in an hour. The lease is avoid (b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer. C is dead. The transfer is void (c) A transfers Rs.500 to B on condition that he shall murder C. The transfer is void. (d) A transfers Rs.500 to his niece C if she will desert her husband. The transfer is void. Section 25 gives us the first rule which says that if an interest is created defending on a condition which is either impossible or forbidden by law or is fraudulent or immoral, the interest fails and the estate will never come into existence. In English law conditions which are too vague for performance are also treated as void In Clayton v. Ramaden 1943 A.E.R. 16 a condition that a bequest was to be forfeited if the legatee married a person who is not of Jewish parentage" was held to be too vague the precise degree of Jewish blood required was an uncertain factor. On the other hand a condition subsequent so tainted is ignored and the estate becomes absolute. This is laid down in section 32. A makes a gift of his field to B with a provision that if he does not within a year's time set fire to C s haystack the gift shall be void. This is a void condition subsequent. The gift is a good gift and is not affected by the void condition

Section 23 reads as :-

In order that a condition that an interest shall cease to exist may be valid, it is necessary the event to which it relates be one which could legally constitute the condition of the creation of an interest".

Another rule to be noted is that a condition precedent is fulfilled if it is substantially complied with, whereas a condition subsequent must be strictly fulfilled; because a vested estate may be absolutely destroyed, while in the former case

an estate in given to one and so the condition need be substantially complied with Sections 26 and 29 read with Section 28 deal with this.

Section 26 : deals with the fulfillment of condition precedent, says "where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property the condition shall be deemed to have been fulfilled if it has been substantially complied with".

Illustrations to the section are (a) A transfers Rs. 5,000, to B on condition that he shall marry with the consent of C, D and E, E dies B marries with the consent of C and D. B is deemed to have fulfilled the condition A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C'D and E' but obtains their consent after the marriage. B has not fulfilled the condition. This is approval and not consent. So the condition has not even been substantially complied with. As this is a condition subsequent it should be strictly construed to prevent the legacy to A being diverted.

Performance of condition precedent — The law always favours the early vesting of estates and so a condition precedent may be carried out cy pres pronounced as "see pre" end is fulfilled if it is substantially, carried out.

Illustration a) is like these case of Drwson v. Oliver Massey (1876) 2 Ch. D 753. Where the condition was marriage with the consent of parents, and the consent of a surving parent was held to suffice.

Illustration b) shows where the condition is clear it cannot be evaded. In re Brown's will (1881) 18 Ch. D. 61 where the condition was marriage with the consent of guardians, and the sole guardian appointed by will had died and no gardisn appointed, the condition was not complied with, for the court could have on application appointed a guardian.

Section 27 deals with conditional transfer to one person coupled with transfer to another on failure of prior disposition. The section says; "Where, on a transfer or property, an interest therein is created in favour of one person and by the same transactions an ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor."

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the disposition, shall not take effect unless the prior dispositions fails in that manner.

Illustrations to the section are: a) A transfers Rs.500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect b) A transfers property to his wife; but, in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect

The words "shall fail" in the section indicate that the prior interest is valid and fails subsequently by the reason of the valid condition not being fulfilled. If the prior interest is valid under section 13 or 14 the subsequent interest fails also under that section or under the combined effect of sections 25 and 28.

Acceleration :

In other cases i.e., where the prior interest is valid and fails as the valid condition on which it rests has not been fulfilled, this section applies. The law favours the vesting of estates, says that subsequent interest takes effect as if the prior interest had never been in the way. This result is an acceleration of the subsequent Interest. In Jull v. Jacobs (1876) 3 Ch.

d. 703 there was a bequest to A for life and then to his children. The gift to A failed as he had arrested the will; but it was held that the life estate being out of the way, the gift to the children took effect The Privy Council in Ajudhia v. Pekh-mun Kvar (1880) 10Cal. 42 followed the ruling in Jull v. Jacob's, where there was a bequest to a wife for life and then to her children, the gift to the wife having failed under a local Act for want of registration, the effect of such failure was to accelerate the gift to the children. The rule has been justified on the ground that it gives effect to the intention of the grantor.

But a failure of a prior gift does not accelerate a subsequent transfer not taking effect on the determination of the prior interest thus a subsequent gift cannot be accelerated, where the persons who are to take under it are only ascertainable at a future date. It also cannot take effect unless two gifts are dependent on each other.

Exception :

The second clause refers to the exceptional case where there is expressed intention that the ulterior disposition shall take effect only when the prior disposition falls to take effect in a particular manner, for instance, where there is a gift to the testator's wife absolutely, and a gift over in case she died in the lifetime of the testator, and both die in the shipwreck, and it is impossible to prove who died first, the result is an intestacy-Underwood v. Wing 11 Bea.459. This was the old law. But by the Property Act, 1925 where two persons die under such circumstances which render uncertain which of them survived the other, such death shall be presumed to have occured in order of seniority. There is no such presumption in India it being a question of fact in each, case. How'ever it is interesting to note here that as far as intestate succession is concerned. Section 21 of Hindu Succession Act.1956, provides a presumption to the effect that younger should be presumed to have survived the elder in case of simultaneous deaths.

Section 28 deals with alter or transfer conditional on happening or non-happening of specified event. It says on a transfer of property an interest therein may be created to accrue to any person with the condition super added that in case a specified uncertain event shall happen such interest shall pass to another person or that in case a specified uncertain son. In each case the dispositions are subject to rules contained in sections 10, 12, 21, 22, 24, 25 and 27.

Conditional limitation :

A conditional limitation is one containing a condition which divests an estate that has vested and vests it in another person as regards the prior interest it is a condition subsequent but as regard the ulterior interest it is a condition precedent. In Umes Chunder v. Zahoor Fatima 1891) 18. C.I.164. A settled property on his second wife for the life and then on her son it he should have a son, but if she should not have a son, then sons by the first wife took a vested interest liable to be divested by the birth of a son to the second wife.

Sections specified under the Section :

The application of these sections Can be best explained by illustrations.

Section 10—A transfers his field to B without power of alienation and in case of B's death Without issue, to C also without power of alienation. The restriction is void in both cases.

Section 12—A transfers his field to B, and if B becomes insolvent to C.B becomes insolvent. The field vests not in C but in the Official Receiver or the Official Assignee as the case may be.

Section 21—A transfers his field to B and in case of B's death without issues to C.C. has a contingent interest which becomes vested on B's death without issue.

Section 22—A transfers his field to B and on B's death to such of the children of C as shall attain the age of 18. All the children of C who are alive at B's death have an interest, which vests when they attain the age of 18.

Section 21-A transfers his field to B for life and then to C, it C goes to England C does not go to England until a year after B's death C's interest fails.

Section 24—A transfers his field to B and on B's death without issue to the sons of C or the survivor of then'. The sons of C who survive B take the field.

Section 25—A transfers his field to B on condition that he murders C with a provision that on B's death without issue the field shall belong to D. The interest both of B and of D fails.

Where an absolute estate is given to a donee, and then a further interest is given merely after or on termination of that donee's interest, and not in defeasance of it, the further interest will be void for repugnancy. Where an absolute estate with power of alienation is given to the widow and a clause is added "if at the time of the death of the widow there is no adopted son, or son or wife of the adopted son, then the heir according to Hindu Shastras be alive as the time shall get the properties which remain after disposal by the widow by way of gift or sale of the same" the gift over is invalid.

Section 29 deals with the fulfillment of condition subsequent "An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is, strictly fulfilled". The illustration is: A transfers Rs. 500 to B, to be paid to him on his attaining majority or marrying, with a promise that if B dies a minor or marries without C's consent, Rs. 500 shall go to D. B Marries when only 17 years age, without C's consent. The transfer to D takes effect.

It has already been seen that where conditions subsequent are concerned because on its fulfillment an estate is taken away the condition must be strictly complied with or in other words if the estate is vested it is not to be taken away except by clear words. If there is any ambiguity in the condition subsequent it will be read in the sense most favorable to the vested interest, for instance, a gift to A for life and then to his children with a gift over in the event of A's death without leaving children is construed as a gift over. In the event of A's death without having had a child—Maitland v. Chalie (1882) Mad. S.G. 243. This is the rule in 'Maitland v. Chalie's case. But this rule will not apply where the words were clear and unambiguous such as "leaving no children living at her death".

Ignorance of a condition is no excuse for noncompliance for a person taking under an instrument cannot plead ignorance of its contents. A condition violated under duress will not forfeit the bequest. For instance if the condition is to live in a holy place is not broken when the devisee was forcibly removed to another place.

Next let us distinguish a condition precedent from a condition subsequent.

	Condition Precedent	Condition Subsequent
1.	On fulfillment of the condition an estate not previously vested becomes vested.	On fulfillment of the an estate previously vested becomes divested.
2.	If fulfillment is impossible, both the condition and the estate limited upon it are void.	If fulfillment is impossible the condition fails and the previous estate becomes indefeasible.
3.	Substantial compliance is sufficient, i.e, doctrine of Cypres is applicable.	Must be strictly fulfilled.
4.	If the condition is illegal the estate limited upon it fails.	If condition is illegal, the previous estate becomes indefeasible and the condition is ignored.

Section : 30 of the Act deals with prior disposition not affected by invalidity of ulterior disposition. The section reads as follows, "If the ulterior disposition is not valid, the prior disposition is not affected by it". The illustration to the section is; A transfers a farm to B for her life, and, if she does not desert her husband to C. B is entitled to the farm during her life and as if no condition has been inserted.

Subsequent, interest invalid :

When a prior interest is invalid either as offending against the rule against perpetuity or as being illegal or impossible under section 25, the subsequent interest also fails. But under this section where the subsequent interest is in valid, the prior interest is not affected. It A leaves a field to B with a provision that it B does not within a year set fire to C's hays-tack the field shall belong to D. The ulterior disposition in favour of D is invalid under section 25, but it leaves unaffected the disposition in favour of B Where A transfers his estate to B with a provision that on the death of B's last lineal male descendant the field shall belong to the lineal descendant of C, the ulterior disposition to C is invalid under the rule against perpetuity, but the estate of B is not affected.

Lord Langdale in Ring v. Hardwick (1840) held that an absolute gift will not be affected by a gift-over, which is void for remoteness. In the case of Saraju Bala v. Jyotirmoyee (1931) 58 1-A. 270 a gift of an absolute estate was made to a daughter, with a clause whereby the property was to revert to the heirs of the grantor in case of the failure of her descendants. As the defeasance clause was void the Privy Council held that the daughter was entitled to dipose of the property by will.

Section : 31 deals with conditions that make transfers cease to have effect, in case specified uncertain event happens or does not happen. The section is as follows: "Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition super added that it

shall cease to exists in case a specified uncertain event shall happen or in case a specified uncertain event shall not happen'.

The illustrations appended to the section are a) A transfers a farm to B for life with a provision that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interests in the farm. b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of transfer, his interest in the farm shall cease B does not go to England within the term prescribed. His interest in the farm ceases.

In the above illustrations to section 31, the conditions are conditions subsequent, but the estate reverts in the grantor. They are not conditional limitations which create an interest in a third person. As this section is subject to section 12 any condition subsequently divesting an estate on the ground of insolvency or of attempted alteration would be void. It must also be noted this section applies only where estates are vested end a condition is superadded for its cessation on a certain contingency.

Section 32 requires that the condition subsequent should be valid, otherwise it will not have the effect of terminating the interest to which it is attached. The section says 'in order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest", Section 32 is analogous to section 30. As an invalid ulterior disposition will not affect a prior disposition, so an invalid condition subsequent will not affect an absolute estate to which it is attached. A condition which is void as a condition precedent is void as condition subsequent. When an estate is given to B with the proviso that if within a year he does not set fires to C's haystack his interest shall cease. The condition subsequent is invalid and so the interest of B is unaffected.

Where no time is fixed for the performance of the act. Section 33 applies : "where on a transfer of property, an inter-

est therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act". Supposing a bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfillment of the condition. The bequest ceases to have effect.

Section 34 deals with transfers conditional on performance of act, time being specified. The section is quite clear. It says: "where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the nonfulfillment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefitted by non fulfillment or the condition. Such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But it no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the nonfulfillment of the condition rendered impossible or infinitely postponed, the condition shall as against him, be deemed to have been fulfilled, the condition shall as against him, be deemed to have been fulfilled".

This section is based on the equitable principle that no person can benefit by his own fraud.

DOCTRINE OF ELECTION

Section 35 deals with the equitable Doctrine of Election. Section 35 embodies the principle that a person who takes under an instrument must give effect to every part of it. In

other words the party taking the benefit of an instrument must also bear the burden if any, and that he cannot take under and against the same instrument. "No one may approbate and reprobate". The doctrine is based on intention to this extent the law presumes that the author of an instrument intended to give effect to every part of it. In Copper v. Copper (1874 7H. L.53) this presumption was described as "the ordinary intent implied in every man who affects by legal instrument to dispose of property, that he intends all that he has expressed".

Having explained the doctrine let us look at the section itself. Section 35 lays down :

(1) where a person professed to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect, either to confirm such transfer or to dissent from it, and in the latter case he shall relinguish the benefit, so conferred and the benefit so relinquished shall revert to the transferor or his representative as it had not been disposed of, subject nevertheless.

Where the transfer is gratuitous, and the transferor has before the election, died or where or otherwise become incapable of making, a fresh transfer and in all cases where the transfer is for consideration to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him".

2. The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

3. A person taking no benefit directly under a transaction but deriving a benefit under indirectly, need not elect,

4. A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last Preceding four rules :

Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

5. Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer if he is aware of his duty to elect and of those circumstances which would influence the judgement of a reasonable man in making an election or if he waives enquiry into the circumstances.

6. Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed if the person on whom the benefit has been conferred has enjoyed it for two years without; doing any act express dissent.

7. Such knowledge or waiver may be inferred from act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration :

A transfers to B an estate, to which C is entitled and as part of the same transaction gives C a cole mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

8. If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer the transferor or his representatives may, upon the expiration of that period, require him to make his election, and if he does not comply with such requisition within a reasonable time after he has received it he shall be deemed to have elected to confirm, the transfer.

9. In case of disability the election shall be postponed until the disability ceases or until the election is made by some competent authority.

It is now seen on a reading of section 35 that it sets forth the conditions, where by a person is put to election or act of choosing between two alternatives or inconsistent rights. The condition are :- 1. The transferor profess to transfer a property which he has no right to transfer, it is not very material whether in doing so, he knows or does not know it to be not his property 2. He must confer a benefit on the owner of the property transferred 3. The transfer and the conferring of the benefit must form part of the transaction 4. The benefit must be directly conferred on him 5. The benefit must be conferred on him in the same capacity in which he is owner of the property.

Where the owner dissents from the transfer -- 1. He must relinquish the benefit conferred on him and 2. The benefit intended for him would then revert to the transferor.

Accordingly, if by an instrument you are given by a transferor this property, A worth Rs. 2000/- and in the same instrument you are asked to give X, a property B belonging to you worth Rs. 300/- If you elect to keep your own property B, you must give up the property A for you cannot accept that part of the instrument which benefits you and reject that part which imposes a burden on you. You must elect either to take under the instrument in which case you will have to fulfil the condition and bear the burden imposed on you, or must elect against the instrument in which case neither the benefit nor the burden will come to you if the transferor is alive when you decline to elect and if the transfer is one for consideration he will compensate the disappointed person to whom your property B is given by giving him Rs. 300/- But if the transferor is dead so that a fresh deed cannot be made. Para 1) provides that the property will revert to his representatives, then the law will compensate X by paying him Rs. 300/- the value of B from property A which was intended to be given to you.

The paragraph also provides "where the transfer is gratuitous and the transfer has before the election, died or otherwise become incapable of making a fresh transfer, ... attempt to be transferred to him"

The section mentions all the points that you have to role in connection with the above. You may ask the question why you should not be allowed to keep what is left after making compensation to the disappointed third party? A gives B Rs.1,000 and gives B's property worth Rs. 500 to C. B elects to keep his property. Out of Rs. 1,000, C must be compensated and given Rs. 500 English law gives the balance of Rs. 500 to B and because of this it is B who is responsible to make compensation to C. But under Indian law B gets nothing, as the gift was conditional on his willingness to transfer what is his, and so the Rs. 1,000 reverts, to the representatives, and it is they who are charged with the duty of making compensation to C. It must also be noted that the distinction between Indian law and the English law is expressed, by the statement that "the doctrine of Election in English law rests on compensation, in Indian law it rests on Forfeiture".

2. Under para (2) it matters not whether the transferor though he had the power to convey, or knowing the extent of his authority intentionally exceeded it, so long as the intention to give is clear.

3. Under para (3) the question of election can arise only if a benefit is given directly. This para is illustratad by the illustration appended to section 184 of the Indian Succession Act. The lands of Sultanpur are settled upon C for life, and after his death upon D his only child. A bequeaths the lends or Sultanpur to B, and Rs. 1,000 to C.C, died intestate shortly after the testator, and with out having made any election. D taking administration, to C. as administrator elects on behalf of C's estate to take under the will in that capacity he receives the legacy of Rs.1,000 and accounts to B for the rents of the lands of Sultanpur which accrued after the death a of the tes-

tator and before the death of C. in his individual character he retaining the lands of Sultanpur in opposition to the will".

4. The question of election does not arise under para (4) where a person has two capacities. An administrator or trustee may take a benefit *qua administrator* for the benefit of the estate, or of the beneficiary and may take benefit for himself without being put to an election. Here there can be no question of election merely because owing to circumstances two capacities have merged in one person. The illustration to section 185 of the Indian Succession Act will make this clear "The estate of Sultanpur is settled upon A for life and after his death, upon B.A. leaves the estate of Sultanpur to D and 2,000 rupees to B, and 1,000 to C. B's only child, B dies intestate after the testator without having made an election, C takes out administration to B. and as administrator elects to keep the administrator elects to keep the estate of Sultanpur in opposition to the will and to relinquish the legacy or 1,000 rupees, C may do this and yet claim the legacy of 1,000 rupees under the will.

The exception to the rules contained in para 1 to 4 can be illustrated by the following example :

A the wife has a life estate, B the husband in his will bequeaths to his wife an annuity of 200 rupees during her life, in lien of her life estate which estate he bequeaths to his son C He also gives his wife a legacy of 1,000 rupees. If she elects to take under the will, she has to relinquish the life estate, but if she wants to retain the life estate, she must relinquish the annuity, but in any event she can take the legacy of 1,000 rupees.

5. Para 5 is to the effect that an election made with full knowledge is final; but an election made without such knowledge may be revoked by the representatives of the electing party A the owner of X estate has a life interest in Y estate to which upon his death, his son B is absolutely entitled A gives by will X estate to his son B and Y estate to C, B in ignorance of his own right to Y estate allows C to take possession of it

and enters into possession of X estate. B has not confirmed the bequest of Y estate to C In Sadik Husain Ali v. Hashim Ali (1916 43 I.A. 212 where a Mohammedan executed a voluntary trust deed settling property on his wife in satisfaction of her claim for dower the Privy Council observed; If she was never fully informed of its purport and contents any election by her to accept the provision made for herself and her children By it in discharge of the unpaid balance of her power would of course, be of no avail". Particular care has to be taken where Pardanashin women are concerned to see that they were fully aware of their rights when the acts were done, which are said to constitute an election.

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6. Paras (6) to (9) are to the effect that election may be express or implied, but in order to presume an election from the act of conduct of any person, he must be shown (1) to have been aware of his right to elect; (2) to have intended, to have exercised that right'. (3) to have had full knowledge of such matter as the value of different properties and his own rights, in respect of them unless he has waived the enquiry which would have resulted in such knowledge, Under para (6) knowledge or waiver may be presumed if the donee has enjoyed the benefit for two years without voicing dissert or under para (7) so uses the property as to make it useless for others, as working and exhausting mine. Although there is this time limit, 2 years mentioned under para (6) yet under para (8) the transferor or his representative can at any time after one year call on the transferee to elect and if he fails to elect within a reasonable time, he will be taken to have decided to confirm the transfer.

In case of disability under para (9) the period is prolonged until the disability ceases. The third party has to be patient, all that he can do is to ask transferor or his representative to call upon the donee to elect.

In English Law, no time is prescribed within which election should be made. The parties interested may call upon the transferee to make his election without under delay. The instrument

itself may fix a period and if he fails to make his election within that period he s deemed to have elected against the instrument.

The doctrine of election cannot cure an illegality and being a doctrine of equity it will not be applied so as to lead to inequitable results.

APPORTIONMENT

Sections 36 and 37 deal with the rules regarding apportionment of the income if the property yields income, between the transferor and the transferee. Section 36 lays down that rents, annuities pensions, dividends and other periodical payments in the nature of income shall be deemed to accrue from day to day. Therefore there is an apportionment of such income between the transferor and the transferee and it is a proportionate showing between the transferor and the transferee. Therefore, if a transfer takes place on the 15th of any particular month, the transferee will be entitled to the income 14 days and the transferor for the rest of the 16 days. This section speaks only of the transferor and transferee, and so in case the rent is to be paid by the tenant and in the absence of any duty, on the tenant notice should be issued to the tenant.

It must also be noted that section 36 applies only in the absence of contract to the contrary in Subbaraju v. Seetharamaraju 39 Madras 283, that where in a contract it was stated that the rent for the year was to accrue on a particular date, it amounted to a contract to the contrary. But this decision has been criticized or the ground that merely fixing the date for payment would not under the section make it a contract to the contrary.

Section 37 : merely illustrates how the rule of apportionment contained in section 36 applies in the case of a division of property. Here each is entitled to whatever advantages there are in proportion to their shares. Section 36 : reads as follows : "In the absence of a contract or local usage to the contrary, all

rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly but to be payable on the days appointed for the payment thereof.

Section 37 : "When in consequence of a transfer, property is divided and held in several shares, and there upon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners be performed in favour of each of such owners in proportion to the value of his share in the property, provided, that the duly can be severed and the severance does not substantially increase the burden of the obligation: but if the duty cannot be severed, or if the severance would substantially increase the burden of obligations the duty shall be performed for the benefit of such one of the several owners, as they shall jointly designate for that purpose

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section unless and until he has reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the official Gazette, so directs."

The section is not applicable to involuntary transfers or to cases of succession. The heirs of a deceased creditor are only jointly entitled to enforce the right which the deceased if alive could singly enforce.

Agricultural tenancies have been exempted, as the severance of the obligation to pay rent would cause much harassment to agriculturists.

Lesson - 3

TRANSFER OF IMMOVABLE PROPERTY

Sections 38 to 53

Transfer by person authorized only under certain circumstances to transfer :

Sections 38 to 53 apply to immovable properly only whereas sections 33 to 37 apply both to immovable and movable property. Section 38 reads as follows 'Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances they shall as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to as certain the existence of such circumstances, has acted in good faith "The illustration appended to the section is :- "A, a Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees for purposes neither religious nor charitable to sell a field, or part of such property, to B. B satisfies himself by reasonable enquiry it at the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary and acting in good faith, buys The field from A. As between B on the one part and A and the collateral heirs on the other parts, a necessity for the sale shall be deemed to have existed'".

This section refers to cases arising under Hindu law where the power of transfer of the person representing the estate depends upon circumstances which in their nature are variable the illustration to the section is quite clear. Thus a. Hindu widow has no power to dispose of immovable property except for purposes which the Hindu law recognizes as constituting legal necessity. The section will not apply where the transfer is in-

complete. The onus of proving justifying circumstances is on the transferee, Recitals by the transferor are not generally sufficient proof of necessity for they may be inserted only at the instance of the transferee. They must therefore be supplemented evidence *allunde*.

Transfer where third person is entitled to maintenance :

Section 39 says : "Where a third person has a right to receive maintenance or a provision or advancement or marriage, from the profits of immovable property and such property is transferred ... the right may be enforced against the transferee if he has notice thereof or the transfer is gratuitous; but not against a transferee for consideration and without notice of the rights nor against such property in his hands'.

It must be noted that maintenance is not a charge, unless it has been made a charge by agreement or decree or the widow holds specific item of property allotted to her for maintenance in such cases notice of the charge is sufficient to bind the transferee. This section purports deal with a right of maintenance or the like which falls short of a charge. This is an amended section which gives more protection to the Hindu widow. It is riot necessary that the transferee should be aware of an intention to defraud the widow or to defeat her right to maintenance, as under the old section. In the amended section no such presumption are necessary if he is a transferee for consideration, he takes subject to the right, whether he had notice of it of not. The amended section is not intended to create a charge where none existed. Its effect is to make it unnecessary for widow to prove that the transfer was made with the intention of defeating her right. As pointed out, under the old section a transferee for consideration was protected even , though he had notice of the claim of these third parties, unless the transferor, had the intention to defeat : these clams and the transferee had notice of such intention.

It must also be noted that there is a distinction made in the section between gratutious transferee and transferee for consideration. If the transfer is gratutious, there is nothing for the person entitled to maintenance to prove beyond his or her right to receive maintenance. If the transfer is for consideration he or she has to prove besides his or her right to maintenance that the transferee had notice of same — Ramamurthi v. Kanakarathnam 1947(2) M.L.J. 281.

Burden of Obligation imposing restriction on use of land :

Section 40 lays down "Where for the more beneficial enjoyment of his own immovable property, a third person has independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property or,

When a third person is entitled to the benefit of an obligation arising out of contract, and annexed the ownership of immovable property, but not amounting to an interest there in or easement thereon such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby but not against a transferee for consideration and without notice of the right or obligation not against such property in his hands" The illustration to this section is—A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent against A.

This section deals with the law relating to covenants affecting land. We have already noticed that section 11 deals with restraints on alienation and that were property is alienated absolutely restriction and direction are to be ignored. But section 40 is to the affect where such direction is made in respect of the piece of immovable property for the purpose of securing the beneficial enjoyment of another of immovable property, this general principle contained in section 11 should not

affect any right which the transferor may have to enforce such direction. The relation between section 11 and section 40 is summed up by Mitra, "Section 11 is confined to affirmative covenants and does not apply to restrictive or negative convenents. The first paragraph of section 40 as now amended is confined to restrictive convenants and has no application to affirmative convenants. Section 11 again applies only as between the transferor and the transferee, where as restrictive and negative convenants can be used by a third party against the transferee as laid down in section 40".

Taking the first paragraph - Right of transferor against purchaser from transferee. It will be noted that the second para of section 11 releases to the right of the transferor as against the transferee (1) to enforce the performance of an affirmative covenant, and (2) to restrain the breach of a negative covenant. The first paragraph of section 40 relates to the right of the transferor as against a Purchaser from a transferee to restrain the breach of a negative covenant. An affirmative covenant cannot be enforced against a purchaser from a transferee. The "third person" spoken of in the first paragraph is either the original covenantee or his transferee. For instance, if A owns two properties X and Y and sells X to B, he may impose a restriction on B that he shall for the more beneficial enjoyment of Y, keep open a portion of X adjoining Y and not to build on it. The "third person" maybe A who has no longer any interest in X or any easement thereon, or he may be a purchaser of Y from A whom we shall call C. If B sell X to D and Dhas notice of the covenant and D threatens to build on the whole of X, A or C may restrain D from so doing.

Restrictive Covenants in English Law :

Covenants are not mere agreements they may be more than that. A covenant may (1) be a grantor reservation of an equitable interest in land or an easement or (2) it may be a personal contract. In the first case the transferee takes subject to the easement or if it is an equitable interest then subject to

it unless he acquires a legal estate with out notice or is protected by want of registration. But in the second case as the general law is that all contracts are personal, the covenant which is only a personal contract does not bind the transferee, but to this there are two exceptions (1) leases and (2) covenants annexed to the land.

Leases :

English common law has always recognised leases as an exception to the rule that contracts are personal. At common law a lessor could enforce the covenant to pay rent against the assignee of the lessee and the assignee of the lessee could enforce covenant, for quiet enjoyment against the lessor. The law regarding the enforcement of the burden of convenants in leases was settled in Spencer's Case; (1853), which laid down that positive covenant would bind an assign of the tenant, only if the original tenant had contracted expressly for himself and his assigns. The Law of property Act of 1925 altered this and the word assigns is no longer necessary now to bind subsequent transferees from the tenant. This is the law in India also. Facts of Spencers case will be dealt latter.

Covenants annexed to the land :

Covenants bind the land in its inception, or they affect the nature, quality or value of the land. The benefit of such covenants run along with the land for the benefit of which it is expressed to be made. In Rogers v. Hosegood the purchasers of a plot or building land covenanted with the vendors with interest that covenant should ensure for the benefit of certain land of the vendors, not to erect more than one dwelling house should be adapted for and be used for private residence only, it was held that the covenant ran with the land could be enforced by the assigns of covenantee. Covenants which run with land must have the following characteristics 1) They must be made with a covenantee who has an interest in the land to which they refer. 2) They must concern or touch the land. It

was immaterial the covenantee's assign was unaware of the covenant when he purchased. In Dyson v. Forster the covenant was that the colliery company pay compensation to the owners of the surface land for damage done by the working of the coal. Here it was held that the covenant was not simply collateral but one which affected the nature, quality or value of the land.

From the above it is clear that the benefit of a covenant annexed to land passes from the covenantee to his assign of any land clearly intended to be benefitted by the covenant who can enforce it against the original covenantor. The leading case on this point is Austerberry v Corporation of Oldham (1885) 29 Ch. D.8 750. The owner had conveyed a site of land adjoining his own to trustees who had covenanted to maintain and repair a road on it. The owner sold his adjacent land to the plaintiff, and the trustees sold the road site to the defendants. It was held that the plaintiff could not enforce the covenant against the defendants. L.J. observed: Does the burden of this covenant run with the land so as to bind the defendants?" The defendants have acquired the road under the trustees and they are bound by such covenants as run with land. Now come to face the difficulty; does the, covenant to repair all this road run with the land that is does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of land lord and tenant. The authorities which refer to that class of cases have little, if any bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with land, unless the covenant does upon the true construction of the deed containing covenant, amount to either a grant of an easement or a rent-charge. Or some estate or interest in the land". The burden of a covenant annexed to the land could only be enforced against the assign of the covenantor in the case of a lease, and this was settled in until Spencer's Case until the decision in Tulk v. Moxhay see under sec. 11. That case decided that in equity a restrictive covenant

imposed for the benefit of land retained by the lessor or grantor was binding on a purchaser with notice. In other words, a covenant restricting the user of land runs with the land in equity Any covenant restricting the user of the land may be one imposed for the personal benefit of the vendor only. In such cases it is a personal and collateral covenant not annexed to the land. Where the vendor sells all his property and the purchaser, enters into a restrictive covenant with the vendor for the benefit of the vendor, is a covenant of this kind; it is enforceable by the covenantee against the covenantor, but neither the covenantee nor his executors can enforce it against subsequent purchasers, In building schemes a covenant imposed not for the benefit of any particular plot but in order to enble the vendor to get a better price for the rest of the property are covenants of this kind. But in Building Schemes the benefits of the restrictive covenants will accrue to the purchasers and they will be entitled to enforce them. This may occur where the land is sold in plots under a building scheme. The conditions of sale prescribed restrictive covenants to be entered into by the purchasers of each plot; and the presumption is that the covenant is for their mutual benefit - Torbay Hotel r. Jenkins (1927) 2Ch. 225.

Restrictive covenants in Indian Law :

Indian law follows English law. Section 108 (c) deals with the benefit of a covenant for quiet enjoyment in a lease, which may be enforced by the assignee of the lessee, while section 109 deals with the right and liabilities of the lessor's transferee. In Mathewson v. Raw Kanai singh (1900) 39 Cal. 675 the Calcutta High Court held that covenant is regarded as annexed, to land if it binds the land in its inception or affects the nature quality or value of the land. Sections 55 (2) 65, and 108 of the Act. deal with these covenants. In these sections it is expressly enacted that the benefit of such covenants runs with the interest of the covenantees.

Affirmative Covenants :

Affirmative covenants are collateral and so they are not annexed to the land and to not run with the land either in law are equity. As already seen covenants to lay out money in buildings or repairs cannot be enforced against the purchaser from the covenantor. The exception are leases, where a covenant to pay rent is a covenant annexed to the land and the benefit of it passes to the lessor's assignee-sec. 109. The lessee's assignee is liable to the lessor by the privity of estate only. Covenants for preemption are personal and collateral and do not run with the land - Rambaran v. Ram Mohit 1967 I.S.C.R.293.

Second Paragraph — Contractual Obligation — The right in para-1 of the section is one which has already come into existence before the transfer and presupposes ownership of property. The right referred to in the second para, has also come into existence before the transfer but it does not presuppose ownership of property. It arises only out of contract and is purely personal and as such the owner of the right need not be the owner of any property at all. But the right even thought it is personal must be attached to the ownership of immovable property. In the illustration appended to the section, such an agreement of sale of land in English law creates an equitable estate in land, but under Indian law. which does not recognise equitable ownership, such a contract for sale creates an obligation, but it is an obligation annexed to the ownership of immovable property. Section 54 of the Act, Sec 3 of the Specific Relief Act and Sec. 91 of the Trusts Act all say that it is a personal obligation of a fiduciary character which can be enforced by a suit for specific performance not only against the vendor but also against a volunteer and a purchaser for consideration with notice.

Transfer by Ostensible Owner :

Section 41 says : "Where, with the consent, express or implied, of the person interested in immovable property a person is the ostensible owner of such property and transfers the

same for consider ation the transfer shall not be voidable on the ground that the transferor was rot authorised to make it; provided that the transferee after taking reasonable Care to ascertain that the transferor had power to make the transfer has acted in good faith". The principle involved in this section is that rule down by the Privy Council in the case of Ramcoomer v. Macqeen (1872) 11 Beng. L.R. 46. We have the statutory application of the doctrine of estoppel in Sec. 41. It was first laid down in England by the House of Lords in Craincross v. Lorimer. The section applies only to voluntary transfers and has no application to court sales.

The doctrine of holding out has been embodied in S41 of the Transfer of property Act. S41 is not applicable on involuntary transfers like auction sales. A.I.R. 1996 S.C.2773.

Requirements of the section. Unless the following conditions are satisfied the section cannot be applied. (1) The transferor is the ostensible owner; (2) he is so by the consent express or implied of the real owner; (3) the transfer is for consideration and (4) transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer If any of the elements are absent the transferee is not entitled to the benefit of the section.

Who is an ostensible owner? He is an apparent owner. Though he appears to be owner, but he is not the real owner. He is one who has the indicia of ownership without being the real owner. The possession of a manager with the consent of the real owner cannot be treated as oetensible ownership; even where the manager's name had been entered as owner in the Municipal Tax Register. Muhemed Sulaiman v. Sakln Bibi (1922) 44 All 574 A co-shares in occupation of a joint family residential property cannot be held to be an ostensible owner - Savithri v. Kunyakose (1958) A. Ker, 325 in order to succeed under this section the transferee must plead in and set out relevant facts in his pleading. An Ostensible owner has no real title to the property: controller of Estate duty v. Aloka Mitra A.I.R (1982) SC. 102.

A benamidar is an ostensible owner, and if a person purchases from the benamidar, the real owner cannot recover. Unless he shows that the purchaser had actual or constructive notice of the real title. Swaminatha v. Krishna (1942) AM 28. It is to be noted that the principle of this section is not confined to sales. It applies to mortgages also. A mortgagee from an ostensible owner acting in good faith and with reasonable care has frequently been allowed the benefit of this section.

Consent :

It need hardly be pointed out that consent means free consent and not that obtained by fraud, coercion or mispreresentation. The consent must be of the person interested i.e., of the owner. Therefore a minor will not be bound under this section if the guardian consents to another passing off as owner. Abdulla khan v. Muhamed Bundi (1912) 4 All 22 implied consent is consent evidenced by conduct if the real owner knows that another person is dealing with his property, as if it were his own and acquiesces his inaction will simply consent But silence will not work as estoppel, unless is it such as to induce a belief that the party keeping silence, has no rights.

Attestation does not by itself imply consent. But it can be proved that attestation took place in circumstances which involved knowledge of or consent to the transaction, Reasonable care is such care as an ordinary man of business would take. A transferee who does not enquire into the title is not protected by this section. Mere entrusting an inquiry to a solicitor does not amount to reasonable care. It must also be remembered that Revenue Records are not document's of title and it is not safe to rely to the entry of the transferors name in the revenue registers. In a dispute the transferee must show that he has made the usual enquiry into title if he want the protection of this section Rajant Kanta v. Bushiram Mestari (1929) 49 Cal L. J. 532. Good faith means that the transfers has acted honestly and in the real belief that the ostensible owner is the owner. The section also applies to cases where

the transferor has actually some interest—partial interest— and the appearance of an interest greater than he really has. The section is not limited to the immediate purchaser from an ostensible owner but extends to subsequent transferee. Even if one immediate purchaser had notice. It the subsequent transferee purchases bonafide and with reasonable care is protected

Transfer by person having authority to revoke former transfer:

Section 42 deals with this it says "where a person transfers any immovable property reserving power to revoke the transfer and subsequently transfers the property for consideration to another transferee such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the power". Illustration to the section is as follows. A lets a house to B. and reserves power to revoke the lease if in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards, A thinking that such use has been made lets house to C. This operates as a revocation of B's use of the house having been detrimental to its value.

The principle of the section is that if a person has a right to transfer property, after exercising right to revoke previous transfer a transfer to such property by him will imply an exercise of the right of revocation. The illustration given above shows that if the power of revocation is subject to a condition, the transfer is subject to the same condition.

Transfer by unauthorised person who subsequently acquires interest in the property transferred :

Section 43 says : "Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and proposes to transfer such property for consideration such transfer 'shall, at the option of the transferee' operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option". Illustration:- A, a Hindu, who has separated from his father B, sells to C three fields, XY and Z representing that A is authorised to transfer the same. Of these fields Z does rot belong to A, it having been retained by B on the partition; but an B's dying A as heir, obtains Z, C not having rescinded the contract of sale, may require A to deliver Z to him.

Feeding the estoppel :

The English law of estoppel is "where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or as it usually expressed feeds the estoppel". This principle is based partly on the common law doctrine of estoppel by deed and partly on the equitable doctrine that a man who has promised more than he can perform, must make good his contract when he acquires the power of performance. Under the common law doctrine, if a man sells property which does 'not belong to him and afterwards acquires such title as enabled him either wholly or partially to perform his contract, he is bound to do so : and the subsequently acquired estate feeds the estoppel which arises out of the vendor's covenants for title express or implied In Tilakdari Lal v Khedan Lal (1920) 48 Cal. I.(P.C) Lord Buck Master stated the rule of estoppel by deed as follows: "If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires interest sufficient to satisfy the grant the estate instantly passes". This means the estate passes even without any further act of the transfer, or and the estoppel prevails even against a purchaser for value.

This equitable doctrine is an application of the equity as soon as the property is afterwards acquired, an equitable estate in it passes to the property is afterwards acquired, an

equitable estate in it passes to the transferee. Under the Indian system as soon as the property is afterwards acquired no estate passes, but an obligation is annexed to the property and the transferor becomes trustee of it for the transferee. This equitable rule is enacted in sec. 13 (i) (a) of the Specific Relief Act, 1963 according to which the purchaser can compel the transferor to make good the contract out of the interest he has acquired.

Fraudulently or erroneously represents:

As the equitable doctrine of estoppel requires a man to make his representation good, the words; "fraudulently or erroneously represents" have been said to make-estoppel the foundation of the section, and in the absence of such representation the section does not apply. The representation need not be intentionally false. It requires an erroneous misrepresentation or a fraudulent representation, and whether it is erroneous or not is of fact. The representation can be by word of mouth or document. Where a partner tells the property of the firm in his own right and subsequently on the dissolution of the firm is allotted the same property, this section would apply — Peyarelal v. Mt. Misri (1940) All. 674.

Transferees acts on representation:

There can be no estoppel when the facts are known to both parties. The right of the transferee arises from the fact that he has not got what he has paid for. In Mulraj v Indar Singh (1926) 48 All. 150 it was held that the word 'represents' used in sec. 43 clearly shows that the transferee must have acted on the representation. In Pandit Bangaram v. Karumoorty (1911) 34 Mad. 159, A mortgaged to B a half-share in family property in which he was entitled only to a third share. Subsequently A's father died and A became owner of a half-share. But as B knew that A had only a third share he could only enforce his mortgage against a third share.

For consideration :

The section does not apply to gratuitous transfer and gifts; also not to an invalid transfer. In order to get the benefit of the section, two conditions must be satisfied; (1) the contract of transfer was made by a person who was competent to contract and (2) the contract would be subsisting at the time when a claim for recovery of the property is made, where there was a transfer which is invalid as forbidden by law or contrary to public policy the section will not apply. Thus if a minor transfers the section has no application - Ajudhia Prasad v Chandan Lal. So too if the transfer required the previous permission of the collector Deomany Atmaram (48) A.N. 122 In Annada v. Gour Mohan (1921) 48 Cal. 536 it was held that the principle of feeding the estoppel has on application when if the contract of assignment refers to property which has been expressly rendered inalienable by the Legislature. In Jumma Masjid of Kodimamandra Deviah (1962) 2. S C.R. 554, Supreme Court held that even where a person having a mere spes successions represents that he is the owner thereof, and transfers it to another he is precluded from questioning the validity of the transfer it he later succeeds thereto or acquires an interest therein

Any interest which the transferor may acquire :

The section as already noted above does not apply to gifts but applies whatever the nature of the after-acquired interest may be e g, IF IT: is a charge upon part of the property the benefit of the charges passes to the transferee But it must be remembered that the word "in such property" mean that the section will apply on when the transferor acquires an interest in the property which is the subject of the transfer. It does not apply to an interest acquired in any other property. The words "at the option of the transferee" implies that the transferee may take the after acquired interest, but that cannot be forced upon him. The title of the after acquired property does not pass instantly, but only on demand made by the transferee. There is no particular form of exercising the option. If the trans-

feree has rescinded the contract and elected to seek a remedy in damages, the contract is not in existence and the transferor can have no interest in the subject-matter of the contract.

The Proviso to sec. 43 protects transfers in good faith with out notice of the option. The option can be even exercised against the heir of the transferor but not against a transferee in good faith for consideration without notice of the existence of the option. This is because, till the option is exercised the transferee's right to the after-acquired property is only a contractual obligation and the transferor holds the property in trust for the transferee. A mortgaged property in which he had no interest to B representing that he had transferable interest. A. Subsequently acquired transferable interest which he transferred to C, who had no notice of B's mortgage. The transfer was made before he exercise his option and therefore B's mortgage was subject to the rights of C.

Co-ownership - Transfer of immovable property :

Sections 44 to 47 deal with such transfers. It would be well to deal with them conveniently grouped together. Section 44 says "where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such share or interest and so far as necessary to give affect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same but subject to the condition and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house". The remedy available to the stranger transferee is to file a suit for general partition. If the common dwelling house is of such a nature that it cannot be divided then the remaining co-owners can claim the property to

be resold to them by depositing the sale amount in the court. But if the property can be divided or, the dwelling house ceased to be a dwelling house, the stranger transferee will be entitled to partition and separate possession. In this case, sec- 4 of the Partition Act and Sec.22 of the Hindu Succession Act. 1956 have to be taken into consideration. The dwelling house cease to be dwelling house when no members of the next joint family are living in the house or, it is let out for others.

Transfer by one Co-owner :

This section is based on the principle of subrogation, or substitution. When one of the several co-owners transfers his share, the transferee stands in the shoes of the transferor. His rights against the other co-owners are those which his transferor had against the other co-owners. He has the liabilities also which affected the share he purchased at the date of the transfer. The object of the section is really to put off strangers who may purchase the undivided share of a co-sharer of an immovable property, so far as dwelling houses are concerned to make it possible for a co-sharer who has sold his share to buy off the stranger purchaser. The words 'transfer his share or interest' the section applies to all transfers including sales and mortgages.

Section 45 deals with joint transfer for consideration. It says where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests in which they were respectively entitled in the fund ; and, where such consideration is paid out of separate funds belonging to them respectively they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the ab ›nce of evidence as to the interests in the fund to which they were respectively advances such persons shall be presumed to be equally interested in the property.

Co-owner's interest :

When property is transferred for consideration to two or more persons jointly then their interest is in proportion to the consideration paid by each. If the consideration was from a common fund then their share would be equal to their interest in the fund. The section does not deal with the question as to the nature of their taking the property, whether as joint tenants or tenants in common. A joint tenancy connotes unity of title, possession, interest and commencement of title, in a tenancy in common there may be unity of possession and commencement of title, but the other two features are absent. Under English law when a transfer is made to a plurality of persons the presumption is that a joint tenancy with a right of survivorship unless a contrary intention is indicated. This principle is adopted by sec. 93 of the Indian Succession Act. The Hindu law rule is exactly the opposite. Under section 46 in the absence of evidence showing in what shares the consideration was paid there is a presumption that the co-owner's interests are equal.

Transfer for consideration by persons having distinct interests-Section 46 deals with such transfer it says "where immovable property is transferred for consideration by persons having distinct interest therein, the transferees are, in the absence of a contract to the contrary entitled to share in the consideration equally where their interests in the property were of equal value and where such interests were of equal value, proportionately, of the value of their respective interests". The illustrations appended to the sections are ; (a) A, owning a moiety, and B and C each a quarter share, of mauza Sultanpur exchange an eight share of that mauze for a quarter share of mauze Lalpura. There being no agreement to the contrary. A is entitled to an eighth share in sultanpur, and B and C each to a sixteenth share in that mauza. b) A being entitled to a life

interest in mauza Atrali and B and C, to the reversion sell the mauza for Rs 1000. A's life estate is ascertained to be worth Rs 600, the reversion Rs. 400. A is entitled to receive Rs. 600, out of the purchase money. B and C to receive Rs. 400.

Distinct Interest:

You will notice that section 46 is the converse of section 45 That section refers to interests in the property of several purchasers, while this section to the shares in the consideration of several vendors. The shares of the transferees in the consideration are in proportion to their respective interests in the property transferred. The second illustration is that of a tenant for life and a remainder man where it is necessary to have their respective interests valued.

Transfer by Co-owners of share in common property. Section 47 says; 'Where several co-owners of immovable property transfer a share their in without specifying that the transfer to take effect on any particular share or shares of the transferors, the transfer, as among such transferees, takes effect on such shares equally where the shares were equal and, where they were unequal proportionately to the extent of such shares.' The illustration to this section is—A, the owner of an eight-anna share and B and C, each the owner of a four anna share in Sultanpur, transfer a two anna share in Sultanpur to D, without specifying from which of their several shares the transfer in made. To give effect to the transfer one-anna share from each of the shares of B and C

Priority of rights created by transfer :

Section 48 lays down 'Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together each later created right shall, in the absence of a special contract or reservation binding the earlier transferees to the rights previously created".

The Doctrine of priority:

The equitable maxim on which this section is based is *qui prior est tempore potior est jure*, which means the first in time prevails. Where successive transfers are concerned if there are successive transfers of the same property, the latter transfer is subject to the prior transfer. Thus, if A mortgages the property to B. and latter sells it to C, what C purchases is only the equity of redemption This means that C's purchase is subject to the mortgages in favour of B. Similarly where there are two mortgages of the sams property the later or puisne mortgage is subject to the prior mortgages. If the puisne mortgages bring the mortgaged property for sale, the (sale will be only subject to the prior mortgages- The words "same date", are to thy effect, if two') mortgages are executed on the same date, evidence may be taken as to which was executed first and the first has priority, if this cannot be determined the mortgages take as tenants in common or joint tenants.

The doctrine of priority has certain exceptions such as. (1) Section 50 of the Registration Act gives a subsequent registered deed, priority over a prior unregistered deed of which registration is optional and where the deeds are antagonistic (2) In a suit for partition if a receiver under the direction of the court mortgages the whole or part of the estate, the mortgages would be entitled to priority over an execution creditor by whom the property was attached after the commencement of the suit for partition, (3) priority is forfeited by fraud, misrepresentation or gross negligence.

Transferee's right and policy :

Section 49 requires that at the date of transfer if the property is insured against loss or damage by fire the transferee may require the transferor to apply the insurance money in case of damage by fire, to the restoration of the promises.

IMPROVEMENTS MADE BY BONAFIDE HOLDERS UNDER DEFECTIVE TITLES . Section 51 says "when the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title; the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee or to sell his interest in the property to the transferee at the then market values thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When under the circumstance aforesaid, the transferee has planted or sown on the property crops which are crowing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them."

Section 51 embodies the equitable maxim that he who seeks equity must do equity. Under English law when a person entitled in equity recovers the property from the owner of the legal estate with the assistance of the court, the court then puts him in equitable terms and compel him to make an allowance for an expenditure which would not form the subject of an active claim against him. The equity involved in this section was enforced by the Privy Council in Kidar Nath v. Muthu Mal (1913) 40 Cal. 555. Where a widow sold property in which she had only a life estate without legal necessity, and reversioner, at whose instance the sale was set aside and the vendee evicted was put on terms to compensate the vendee for the improvements he had made. The section applies only to transferee who in good faith believes himself to be absolutely entitled. Therefore it follows a lessee cannot believe himself to be absolutely entitled so too a mortgagee. An assignee of the equity of re-

demption with knowledge of the mortgages aspect invoke section 51 as he could never have believed that he was absolutely entitled. The condition must be fulfilled before the equity of this section arises. They are firstly the person evicted must be the transferee; and secondly he must have made the improvements believing in good faith that he was absolutely entitled, some of the transferees who have been given the benefit of the section are; a purchaser who purchases bonafide in ignorance of a mortgage; a purchaser from a defacto guardian of a minor who erroneously believed that a guardian has the authority to sell. Durgozi Row v. Fakee Sahib (1907) 30 Maf. 197. A purchaser of a life estate who believed that his vendor was absolutely entitled. In all these cases the rule was applied when the transferee was evicted by the better title. A trespasser is not entitled to compensation for improvements. But if he is acting bonafide erects a structure he is upon ejectment, entitled to remove the materials. If he has planted trees, is entitled to the usufruct the owner can claim compensation for the use and occupation of the land in which the trees are planted.

The transferee may, on eviction, be compensated in two way either (1) by being paid the value of the improvement or (2) by buying out the better title at the valuation of the property irrespective of the improvements The mode of compensation is at the option of the evictor. Improvements mean not manuring or levelling the land, but improvements of building, carrying out necessary repairs and the like.

DOCTRINE OF LIS PENDENS - SECTION 52

Section 52 deals with transfers of property pending suit relating to such property It says. "During the pendency in any court having authority within the limits of India excluding ... ... of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt

with by any party to the suit or proceeding so as to affect the rights of any other party there to under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. Explanation-for the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained- or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution there of by any law for the time being in force".

This is another conflict to rights Suppose a litigation is going on between A and B about the ownership of property. Pending litigation B sells the property to C. The suit ends in A's favour. Between C and A who is to be preferred? Supposing C had notice of the litigation between A and B? In section 52 the ordinary rule of favouring the bonafide purchaser is not applied and between A and C, A would be preferred by the law. The principle is that on new right can be created during litigation so as to affect the result of that litigation. It is based on public policy because if alienations were allowed pendents lite the unsuccessful party would have to proceed afresh against such alienations, unless he is prepared to be defeated by them. In Bellamy v Sabine, Lord Cranworth observed : "Where a litigation is pending between a plaintiff and a defendant as to the rights of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties, but also on those who drive title under them by alienation made pending the suit. whether such alienees had or had not notice of the pending proceedings- If this were not so, there could be no certainty that the litigation would ever come an end".

The doctrine of Lis pendens and the above stated rule is expressed in the maxim *pendente lite nihil innovator*. The rule you will notice is not based on the doctrine of notice, but on expectancy i.e. the necessity for final adjudication. It is immaterial whether the alienee pendente lite had not notice of the pending proceeding.

When we analyse section 52, we find that the rule that no alienation allowed during the pendency of a suit applies— (1) during the pendency of suit. (2) which is not collusive (3) which is in a competent court and (4) in which a right to that property is directly and specifically in question if these conditions are satisfied there can be no alienation so as to affect rights to be created under the decree.

During the pendency of the suit :

The question is for what period is the suit pending? It says the pendency commences from the date of presentation of the plaint in a Court of competent jurisdiction right down to the date of the execution of the decree of the final appellate court or where the decree has become barred by imitation, until the date on which it has become barred. This rule is laid down in the explanation and it has been applied as a rule of justice, equity and good conscience. A suit in commenced by the filing of a plaint, and appeals and execution proceedings are a continuation of the suit. A miscellaneous proceeding commences with the presentation of a petition or application. When an application to sue in *forma pauer* is admitted, the suit is pending from the time of presentation of the application to the court, but if it is rejected it has been held that if the plaint is insufficiently stamped and is rejected and is then represented after making good the deficiency, an alienation between the two dates of presentation Would not be subjected to Lis pendens. if however the court does not return the plaint but recovers the deficit fee the rule of lis pendens, would apply. If a suit is dismissed for default and then restored, the order of

restoration is subjected to lis pendens. So too if a suit is instituted in a wrong court which has no jurisdiction and was returned for presentation to the proper court an alientation affected before its presentation to the proper court is not affected by lis pendens.

An illustration will make the law clear:

(1) A mortgaged property to B. B sued on the mortgage obtained a decree nisi for foreclosure. Before the decree was made absolute, A sold property to C- The decree was made absolute and it was held that C was not entitled to redeem. If he had purchased before suit he would have been entitled to redeem though not made a party. But as his purchase was pendente lite he was bound by the decree-Parso-tam v. Chedda Lal (1907) 26 All. 76. If the other party has assented to the transfer, he cannot afterwards object to it on the ground of *Lis pendens.*

As already seen a transfer before suit is not subject to lis pendens. In Bala Ramachandra v. Danlu (1925) 27 Bom. L.R. 38. A makes a gift of land to B. C sues A for possession of the land- While this suit is pending B transfers the land to D. A dies and C obtains a decree for possession against B as legal representative of A. Is D's title affected by the rule of lis pendens so as to be subject to C's decree? No, because (1) A's gift was before the suit and (2) B was not a party to the suit at the time of the transfer by B to D.

The second point to be noted is that the litigation must be honest and not collusive. The prohibition is only against collusive suits, and therefore there is nothing preventing the application of this doctrine where the suit is decided exparte provided the decree is not fraudulent or collusive-Ram Bharose v. Rampul Singh 42 All. 319. So too if the suit which is contentious ends in a compromise provided the compromise is not tainted by fraud or collusion, Annamalai Chettiar v. Malayandi

Appaya Naik. 29 Mad. 426 F.B Merely because the defendant in the suit admitted the plaintiffs claim it would not render suit noncontentious within the meaning of the section.

Any Party :

These words in the section not only describe a part but refer to the time when the transactions take place, A puisne (second) mortgagee who is not Joined as a party in a prior mortgagee's suit is not a party and an assignment by him during the suit is not affected by lis pendens although the assignee is subsequently joined in the suit. A party to a suit whose name is struck of as a party by consent is not bound by the decree actually or constructively and so is not affected by the doctrine of lis pendens. The words any other party in the section could be clarified by an illustration. A brought a suit against B as the legal representative of the deceased B and obtained a decree Subsequently D who was another legal representative of C filed a suit for declaration that the decree passed against B was not binding on the property of C. During the pendency of that suit the property was sold in execution of the decree in the suit It was held that section 52 had no application as D. was not any other party but a legal representative of C.

The right to immovable property must be directly and specifically in question:

This is the essence of the rule of lis pendens. So in a dispute for money, the rule does not apply. Where Lis pendens is to apply, the description of the property in the pleadings must be sufficient to identify the property. In a suit for maintenance by the Hindu widow, if the items of property in the hands of reversioner are specified it would not attract the doctrine, but it would be otherwise, if she had claimed that her maintenance should be charged upon it Manicka Gramsni v. Eltappa Chetti 19. Mad. 271. A misdescription of the land in the pleadings will prevent the operation of the doctrine, but not if the land is

identifiable in spite of the misdescription; so too the alienee in such a case is hit by the doctrine-Transferred or otherwise dealt with - refers to sales mortgages, leases and exchanges. It must also be noted that section 52. applies only to voluntary alienations and not court sales, Whether the doctrine applies to sales for recovery of taxes that is, involuntary transfers there is a difference of judicial opinion Madras, Patna and Bombay have applied the doctrine with exceptions e.g., Madras has not applied the doctrine in sales for recovery of revenue, but applied it for sales of recovery of income tax and abkari dues.

The rule of res judicata prevents the owner from dualing lis pendens and once a judgement is pronounced up a competent court regard to the subject-matter of the suit in which the doctrine of lis pendens applies, the decision res judicata and binds not only the parties to the suit but the transferee pendence lite.

The next point to be seen is that the suit must be pending in a competent court. It also states that the doctrine will apply only to suits pending in Indian Courts. This is obviously founded on the fact that in foreign courts, not only the procedure but even the remedy may be different and governed by different and governed by different considerations. Illustrations of this point will be found earlier in the lesson. The Privy Council is not a foreign court for it exercised juriediction in British India.

English Law :

In England a lis pendens has to be registered if the doctrine is to apply and before a person without notice can bound by the result of the litigation. Unlike under Indian law, under English law, notice is important and a party is, bound if he had notice or if the lis pendens had been registration being regarded as tantamount to notice,

FRAUDULENT TRANSFER — SECTION 53

Section 53 lays down (1) - "Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated of delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall effect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to dafeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of this sub-section, no transfer made with out consideration shall be deemed to have been made with intent to defraud, by reason only that a subsequent transfer for consideration was made".

This section has been remodelled by the Amending Act of 1929. The transfers referred to in this section are transfers binding between the parties but voidable in the circumstances stated in the section. The transfer is valid until set aside. As a benami transaction Is not a transfer, it is not meant to operate between the parties and generally for the purpose of defrauding creditors. A marriage settlement made to defeat and defraud creditors is voidable under this section.

A partition is not transfer and dose not fall within the scope of this section, but it applies to a fraudulent partition, whereby a sharer can defeat his creditors An assignment by an

out-going partner of his share in continuing partnership, a surrender of a life-estate, a deed of work in favour of another are all transfers: but a relinquishment by one coparcener in favour of another has been held not to be a transfer unless it is found to defeat the rights of creditors The section does not apply to movable property.

A transfer intended to defeat or delay creditors cannot be partly good and partly bad. The only exception is where the transferee uses the consideration obtained for discharge to a prior encumbrance and so becomes entitled to subrogation When the transfer is not voidable as a fraud on creditors, but is only a preference to one creditor effect will be given to the deed to the extent to which it is supported by consideration. The term creditor is correlative to debtor and signifies a person to whom a liquidated or specified sum of money is due all creditors, even proved ones are included the term. The words are the option of the creditors so defeated mean that even a fraudulent transfer is binding between the parties, but it is only open to the creditors to bring a suit for avoiding the sale Not only creditors at the time of assignment but all those who subsequently become creditors are included in the term A man who is going into a trade cannot on the eve of it transfer his property to keep it out of reach of those who may become his creditors. But voluntary settlement made bonafide by person who has ample means outside it to pay his present debts is not void because it is found afterwards to defeat or delay future creditors- Umar Sait v. Union of India (1965) 2 Mad. 250.

Defeat or delay creditors :

The word used is the plural 'creditors,' so the intention must be to defeat or delay creditors generally, and not to prefer one creditor to another. Jessel M R, in Middleton v Pollock (1876) 2 Ch. D. 104 held "The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst

the creditors of the debtor." This was followed by the Privy Council in Musahar Sahu v Hahim Lal (1915) 43 Cal 52. Here the debtor filed an affidavit that he did not intend to transfer his properties and nevertheless, transferred them during the pendency of the suit to another creditor in satisfaction of another debt. Though the first creditor was grossly deceived yet his case was not within the section.

Transferee in good faith and for consideration :

These words in second para of sub-section (1) means where a person acquires property for value and in good faith means not being in any way a party to the fraud of the transferor his right will not be affected by the section although the transferor's intention might have been fraudulent. If the transferee aids and abets the fraudulent intention If the transferor the transfer is voidable. It is the knowledge and intention of the transferee the determining factors. As already noted preference of one creditor to another, even though fraudulent in the law of bankruptcy is not fraudulent under this section. A creditor is a transferee in good faith if the transfer is made in satisfaction of his debt even though he is aware that proceedings have been taken by another creditor for the recovery of his debt, of his primary object is to product himself and not to defeat or delay other creditors. Here no question of good faith arise. Good faith means honesty whether done negligently or not. A Transferee who has constructive notice of a fraud is not a transferee in good faith. The onus of proving want of good faith in the transferee is on the creditor who impugnes the transaction.

The term 'consideration' as used in this section has the same meaning as it has in the Contract Act. Here consideration excludes love and affection. Transfers for natural love and affection are treated as transfers without consideration.

Preference and insolvency:

We have already seen preference one creditor to another is not hit by the section. But not so under insolvency laws. Both the Presidency and Provincial Insolvency Acts says : "With regard to voluntary transfers it is said that any transfer not made in consideration of marriage or made in favour of a person in good faith and for valuable consideration shall, if the transferor becomes insolvent within two years be void. With regard to preference of one creditor over another, a preference of one creditor within, three months of the insolvency can be upset by the other creditors, of two conditions exist. First of all the acts of preference must have been voluntary on the part of the debtor. If the debtor makes payment because the creditor threatens or demands payment this is not preference under the Insolvency law. Secondly, the debtors preference must have been shown in such a stage of insolvency. So under the section the transaction is voidable and not void. So the creditor has the option either to accept it or avoid it. Once having accepted he cannot later seek to avoid it.

Sub-section (2) refers to case of subsequent transferees, where there is a subsequent transfer in competition with a prior transfer without consideration. We have a reatly noticed that bonafide transferee is protected from a fraudulent transferor. The subsequent transfer for consideration does not of itself create a presumption that the voluntary transfer which preceded it was fraudulent.

PART-PERFORMANCE—SECTION-53 A.

Section 53 A was introduced into the Transfer of Property Act only by the Amending Act of 1929- This was to keep in step with the equitable doctrine of part-performance in England which was developed in the case of *Maddison v. Alderson* (1883) App. Case 467- The doctrine arose because the statute of frauds required every contract relating to land to be reduced to writing. Situations arose where one party to an

oral agreement had not only performed his part of the bargain but had acted upon the basis of the agreement, and it was found unjust not to grant such a party relief. So equity developed the doctrine of part-performance which rests on the equitable principle that if a man has made a bargain with another, and allowed that other to act on it, he will have created an equity himself which he cannot resist by setting up the want of formality in the evidence of the contract out of which the equity in part arises.

Part-Performance :

English law : English law has laid down certain well defined rules in order to determine what acts constitute Part-performance. It may be relevant to point out here, that these rules apply to Indian cases also

(1) An act of part-performance must be an act done in performance of the contract, and acts introductory to, and previous to the agreement, cannot, therefore, be act of part-performances. The act must speak for itself so as to connect itself with the agreement

Act such as viewing or inspecting as estate put up for sale surveying that estate or timber in it are not acts of part performance.

Where A promises B to give him a lease of his property, if B obtains such release from C of a right of lease claimed by C; and B obtains such release this is not part performance but only the fulfillment of a condition precedent.

(2) The acts relied upon must be unequivocally and in their own nature, referable to contract such as that alleged. In Maddisons case. A agreed to remain in B''s service in consideration of his leaving her an estate by will. A's continuance in service was not an act of part performance, as it might be referable to some other country.

(3) An act of part performance, must be the act of the party seeking to avail himself of equity. It must change the relative, position of the parties towards the subject matter of the contract, and be such as to tender non-performance a fraud Acts of the party sought to be charged are of no avail.

Both the Privy Council, and the Supreme Court describe section 53 A as "a partial importation of the English equitable doctrine of part performance." But in India it is not an equitable right, but a statutory right The Indian statutory right is restricted in two respects: 1) there must .be a written contract, and (2) it is only, available, as a defence. Section 53A says, "where any person contracts to transfer for consideration, any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer, can be ascertained with reasonable certainty, and the transferee has in part performance of the contract taken possession of the property or any part thereof, of the transferee, being already in possession continues in possession in part-performance of the contract and has done, some act in furtherance of the contract and the transferee has performed or is willing to perform his part .of the contract, then, not withstanding that where there is an instrument of transfer, that the transfer has been completed in the manner prescribed therefore by the law for the time being in force, transferor or any persons ; claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of contract. Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract of of the part performance thereof."

What 53 A seeks to do is to protect the possession of the defendant even where the defendants right obtain specific performance of the agreement has been barred by time. B.M. Deshmukh v. R.L. Warphi A.I.R. 2000 Bom. 337. The words

contracts to ˜˜ansfer for consideration exclude, gifts" 'A gift does not involve a contract, and the doctrine of part performance does not apply to gifts- The section applies to a contract of power governed by Mohammedan taw where .the bride is in possession and has married in performance of the contract The section applies to leases and agreement to lease,. It also applies to usufructuary mortgages with possession. It does not apply to partitions.

By writing :

There must be a written agreement to attract section 53A. An oral agreement will rot suffice. It is not of the essence that there should in all cases be a formal agreement. So when the terms of an agreement are reduced to form a document such document serves the purpose of the this section. But a mere memorandum stating that possession was taken under an earlier oral agreement is insufficient for the purpose of this section, but all operative document incorporating an earlier oral agreement is found sufficient. According to Amending Act the written entrust must be ascertainable with "reasonable certainty".

Signed by him or on his behalf :

It must be signed by or on the behalf of the person who is going to be charged under this section If an agent of Karta has signed on behalf of a joint family or principal unless it has been done on behalf of these persons, the agreement is not sufficient to retract section 53A.

The words any immovable **property mean that the section will not apply only to agreements relating to movable property-The section also apply only to those Cases where the transferee is in possession under a contract to transfer immovable property. Where the transferee has not taken possession the section will not apply. Then words taken 'possession' in the section are indicative that it is necessary that possession**

should have been taken in part-performance of the contract, whether the contract contains a direct covenant regarding transfer of possession or not.

Act of part-performance :

Indian Law- Here a few illustrate lions are given of act as examples as constitutes part-performance and what does not constitute part-performance. The mere retention by a mortgage in possession or a tenant of possession after the expiry of the original mortgage or lease is not part-performance. Similarly, possession obtained after the agreement, but not referable to it is not an act of part-performance. It has been held that the advancing of money's for the purchase of stamp paper for the conveyance was not an act of part-performance- Devi sahai v. Govindrao (1965 A M-P.275.

Has performed or is willing to perform :

These words mean that the section confers right against a party who is not willing to perform his part of his contract. Even where the intending purchaser has taken possession of the property in pursuance of a written agreement, can still be rejected if he is not willing to pay the purchase price. The benefit of the section can be availed of by a vendee who fraudulently pleads, he has paid the whole of the consideration.' He who seeks equity must do equity". This maxim of English law is equally applicable under section 53A. This is called the equity of Walsh v.. Lonsdale (1882-21 Ch D 9. The equity may be stated thus ; where (in a case where a lease not under seal is void at law) A agrees to let land to B on lease and B goes into possession and the agreement is one of which specific performance would be granted. A and B have the same legal rights as between themselves and are subject to the same legal liabilities, as if a lease under seat had been granted on terms of the agreement. Hence, the landlord has the same power of distress as he would have had if a lease under seat had been granted, and the tangent can only be evicted if he had committed such a breach of covenant

as if (if a lease had been granted) have entitled the landlord to re-enter. The equity depends not so much on part-performance as on the fact that there is a valid contract between the parties still capable of specific performance-and is an instance of the rule that equity regards as done what ought to have been done. But so far as section 53A is concerned no equitable consideration can override the specific provisions of this Act or Registration Act regarding writing or registration.

Nature of the right :

The right under section 53A is available only as a defence : The right available under this section is a right available to a defendant to protect his possession, no title in the defendant is created. It merely operates as a bar to the plaintiff asserting his title; to this extent a right is given to the defendant to resist the plaintiff from enforcing his title. There is no right of specific performance under this section. He can only resist dispossession. So the equity here is passive equity. But in England it is active equity which a plaintiff in possession may enforce in an independent suit or proceeding e.g. a suit for specific performance, or for an in junction to restrain dispossession.

Transferor or person claiming under him :

A person claiming under him is person who claims under a title derived subsequently to the transfer, an anterior to it. A person who holds adverse possession to the transferor is, of course, not a person claiming under him- Where a Hindu father executed a document of transfer of joint-family property were not affected, by this section, as they do not claim under the father.

Right expressly provided by contract :

The transferor may enforce such a right. Under an unregistered lease deed the lessee cannot resist a claim for rent by the lessor. The words transferee for consideration without notice' this is the proviso to section 53A. The right of a trans-

feree for consideration who has no notice of the contract or its part-performance is saved by this proviso. The burden that he is such a transferee is on him. This section specifically allows the doctrine of part performance to be applied to agreements which though required to be registered are not registered and to transfers not can be the subject - matter of sale under Section 54. Sale of movable property is governed by the Sale of Goods Act. Accor completed in the manner prescribed therefore by any law. The words agreements otherwise invalid make this clear. If an agreements is -void under any other law, neither this section nor the doctrine of equity can make it valid. This was followed in the decisions of the Privy Council in Ariff v. Judunath C1931) 64 I A. 388. It has also been held that the equity is not available in the case of agreements by a municipal body without complying with the requisite formalities prescribed by the Statute incorporating such body.

The doctrine of part performance is intended to be used as a shield, not a sword.: Jacobs Pvt. Ltd v. Thomas Jacob A.I.R. 1995 Ker. 249 (D.B).

Lesson—4

SALE OF IMMOVABLE PROPERTY

Sections 54 to 57 of the Transfer of Property Act, deal with sale of immovable property. Section 54 deals with the definition of sale; defines the mode of transfer of immovable property by sale and describes a contract for sale.

Section 54 is as follows :

"Sale.' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or, in the case of a reversion or their intagible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immovable property is a contract that a sale of property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

Definition of Sale :

A sale is defined as being a transfer of ownership for a price. 'So in a sale there is an absolute transfer of all the rights in the property sold, the transferor thus retaining for himself no interest in the property. In contrast, in a lease and a mortgage, there is only partial transfer or demise and the transferor

still retains in himself rights over the property, which are the reversion and right of redemption respectively. The words 'transfer of ownership' means ownership of a right and not the right of ownership. From this it follows that a mortgage debt, an easement, lease can all be subject matter of sale under Section 54. But you must know that the creation of a lease or mortgage is not a sale and thus is not governed by section 54. as here no transfer of ownership is involved.

The essential elements of a sale are:

(i) the parties; (ii) the subject matter; (iii) the transfer or conveyance and (iv) the price or consideration. The parties to sale are the seller and the buyer. It is already understood from the general principles discussed in section 7 that the seller should be a person competent to transfer. He must also have title to the property, or in case he is not the owner he must have the authority to transfer. Whereas the buyer may be any person who is not disqualified from being a transferee under Sec. 6 (h) (3). A sale to a minor, we have seen, is valid. At one time the Madras High Court in Navakoti Narayana v. Log-aliga Chetty was of the opinion that a transfer in favour of a minor was void applying the principle of 30 Cal.539 (P.C) Mahori Bibi V. Dharmedas Ghosh. But in a later case the Full Bench of the Madras High Court in Raghavachan v.Srinivasan 40 Mad. 308 (F.B.) held: (i) Sale by a minor alone is void and P.C's ruling in 30 Cal. is a proposition only on that point ; (ii) Sale in favour of a minor is not void. So also a mortgage or a gift in favour of minors; (iii) S. 7 of the T. P. Act which speaks of persons competent to contract applies to transferors and not to transferees. But we have already seen under section 7 that in Mir. Sarwanjan v. Fakhruddin the minor cannot on attaining majority enforce a contract of sale of immovable property, entered by his guardian on his behalf during his minority' as he is not bound by such a contract as there was never any mutuality.

Subject matter of Sale :

Only transferable immovable property can be the subject-matter of sale under Section 54. Sale of movable property is governed by the Sale of Goods Act. According to the definition, immovable property can both be tangible as well as intangible. Lands and houses tangible. A benefit to arise out of land may or may not be tangible immovable property An undivided share in land is tangible as there is physical possession, but an easement, a right of ferry or fishery, intangible. An intangible immovable property of any value, the sale must be only by a registered instrument under Section 17 of the Registration Act Tangible immovable property of value of Rs-100/- and above the sale is to be by a registered instrument or by delivery. A reversion is always by a registered instrument.

Effect of Registration :

Mere registration of the deed does not necessarily pass the property. Registration merely serves as proof of intention to transfer the title, but it is not proof of operative transfers. So if there is a condition precedent that price should be paid before sale it has to be fulfilled. The question where title is to pass on registration or not is one of intention of the parties and this intention is to be gathered from the sale deed itself and from the surrounding circumstances and the conduct of the parties. But where a deed has to be registered, an unregistered deed cannot convey any right with regard to these properties. But as laid down in Varadapillai v. Jeevarathinammal such an unregistered, deed can be used for collateral purpose, to show the nature of possession, that it was perfectly valid This was a case of an unregistered gift deed where possession was delivered.

In *Sathyanarayamurthi v. Lakshmanayya, A.I R.* 1929 Mad. 79. it was held that a transfer of an easement is within Section 54. but not the creation of an easement. Balagurumurty

v. Ramakrishna 41 M.L.J. 267, it was held that the transfer of a mortgage debt is a sale within Section 54. In that case the plaintiff a transferee of a mortgage debt, on finding that the debt was a fictitious one sued for damages for breach of covenant of title. The defendant (original mortgagee) alleged that the transfer is not a sale and consequently there is no breach of implied covenant for title. But the court rightly held that the transfer is a sale and the defendant liable for damages.

Transfer of Ownership :

Transfer should be full and permanent A transferor need not be the full owner. He can have only a limited right like that of mortgage or tenant. Where the transfer is in the form of sale and labelled a sale but it is not intended to pass title it is not a sale-Basalinga v. Chinnaya A.I. R. 1932. Born .247. It was held that a transaction is known by rights it confers and not by the name by which it is labelled by the party Somu Achari v Singaru Achari A.I.R. 1945 Mad 407.

Price :

Price as already noted above is an essential ingredient of all sales Otherwise it is not a sale. In Madam Pillai v Badrakali the husband A orally transferred to his wife B certain properties of value of more than Rs. 100/- in discharge of her claim for future maintenance. He later transferred the same properties to a third party C. by a registered instrument. In a suit by B for a declaration that transfer, in her favour is valid in preference to the second transfer, it was contended for the defendant that the transfer in favour of B was invalid as under Section 54 a sale of immovable property of value of more than Rs. 100/- must be only by a registered instrument. But the court held : (i) transfer is not a sale for "no price" is paid or promised by the plaintiff, (ii) price means money though not the current coin of the realm, but may be paid in future (iii) it is not a gift as transfer in not without consideration; (iv) not exchange as there is nothing in return : (v) therefore the T.P. Act does not gov-

ern, this transfer a d so oral transfer is perfectly valid, hence (vi) the plaintiff has acquired valid title.

It is important to note that price means money though not the current coin of the realm. It must be an ascertained sum or money, ascertained at the time of the transfer, though it is not necessary that the contract should in the first instance itself deter mine the price. Even a stipulation for a pries or market value is good enough. A transfer for services rendered is not a sale for it is not a price but it will be otherwise if the services were rendered for monetary considerations. A transfer partly for money and partly in consideration of other things is not a sale but only an exchange

Transfer of Ownership and Payment of Price :

The price must be fixed in the contract to sell for if the price is not fixed there is no enforceable contract, but the payment of price is not necessarily a sine qua non to the completion of the sale. Where there is a transfer of ownership but the parties intend the price to be paid, but the fact the price is not actually paid will not matter for the reason, in law there is no presumption, that, title passes only on the payment of price, if the intention is that The property should pass on registration, the sale is complete as soon as the dead is registered, whether the price has been paid or not if the stipulation is that the price is to be paid on delivery of the possession, it is a valid sale. Sale is not invalid for inadequacy or inflation or price- From all this it follows, that we could formulate the following propositions: i) the parties should intend to transfer the ownership. (ii) the parties should intend a price to be paid whether in present or future, (iii) where the parties only intend to trans- fer the ownership, but not intend to pay a price, it is not a sale under section 54.

Where the Title has passed, and the seller remains unpaid all that he has a right to sue for purchase money or enforce unpaid sailer's charge, on no account can he sue for

possession in case possession has not been delivered to the purchaser, the purchaser can sue for possession, not withstanding the fact of non - payment of the purchase price.

Distinction between sale and other kinds of transfer :

Before proceeding to a discussion of the rest of the section let us try to draw a distinction between a sale and the other kinds of immovable property.

Sale and Mortgage (Sec. 58):

The "transfer of ownership", marks the difference between a sale and mortgage. In a sale it is an absolute transfer, whereas in a mortgage, the mortgagee holds the property merely as security for the debt secured and so he had only a qualified and limited interest in the property. His only object is to satisfy his debt. In the mortgage there is the right of redemption. There is the relationship of creditor and debtor between both parties in a sale the full proprietary right over the property passes absolutely to the buyer - Indian Sen v. Naubut.

Sale and Exchange (Sec. 118) :

In exchange consideration is not the price. In sale consideration is a price. Exchange applies to both movables and immovables, but also under Sec. 54 applies only to immovables.

Sale and Lease (Sec. 105) :

In a sale there is an absolute transfer. But in a lease what is transferred to the lesser in possession only for enjoyment for a fixed price. Here the lessor retains the reversion and a right of re-entry.

Sale and Gift (Sec. 122) :

In a gift there is no considerations, for a sale consideration is an essential ingredient. In Bakshi Ram v. Daula Ram A.I.R. 1954 Punjab 116, the vendors a Christian mission wish-

ing to help the Christians serving under them sold to them property worth Rs. 8000/- for Rs. 190/- There was no evidence of payment of the price; the transferees has only to pay some subscription. It was held by Punjab High Court is there was no consideration this transfer is only a gift.

Sale and Contract to sell: Here we deal with the last para of Sec. 54 which lays down that title can be transferred only by conveyance. This para departs from English law. Before we proceed with this, let me point out to you that every sale must necessarily be preceded by a contract for sale (contract to sell), because every sale implies contract for sale. The sale itself is very often referred to as a contract of sale.

Under Indian law a contract for sale does not create any interest in property, whereas under English law based on the principle Walsh v. Lonadale, where there is a mere contract for sale, the vendee becomes the owner of the property in equity. Indian law does not recognize equitable estates, as you have often been reminded, therefore Walsh v. Lonsdale does not apply here in Rambaran v. Ram Mohit (1967) I.S.C.R. 293. the Supreme Court has settled this point by holding that a contract for sale does not create any interest in land. So a person who has contracted to buy immovable property has no claim to mesne profits, nor is he competent to apply to set aside an execution sale of the same land after the contract for sale has been entered into. So a contract for sale in Indian law merely vests in the intending purchaser right title to the property) conveyed to him so an agreement does not require registration. So Indian law where there is impossibility of performance of contract, the doctrine of frustration applies and the remedy is damages for breach of contract under Sec. 73 Contract Act. Hope you remember that Indian law does not recognise a dual form of ownership, which English law does viz, legal and equitable ownerships.

In Satyabrata Ghose v. Mugniram Bangur & Co, A.I.R 1954 S.C, 44, it was held even though it does not create an

equitable ownership, contract for sale creates an obligation attached to that immovable property and passes along with the property into the hands of the heirs; and transferees with notice such that it gives rise to a right to enforce specific performance, if the contract is still capable of specific performance. If the buyer is in possession in pursuance of the contract for sale, then he has a remedy under Sec. 53 A.

Failing any of these remedies if he has paid the whole price or a part in anticipation of conveyance, to that he gets a charge under Sec. 55 (6) (b) on the property for the amount paid. Also the contract can be enforced as against a subsequent purchaser who had notice of the contract.

DELIVERY OF PROPERTY

There are only two modes of delivery of property under Sec. 54 and they are Registration and Delivery of Possession. Section 54 is exhaustive and there is no other mode.

Registration :

Ownership does not pass until the deed is registered. Where registration is mandatory. But registration dates back to execution. But the true test is the intention of the parties.

Delivery of Possession :

According to Sec. 54 delivery takes place when the seller place the buyer or such person as he directs in possession of the property. Many High Courts have held that delivery should be actual or real and not constructive e.g. delivery of title deeds is no sale. Controversy has arisen where the vendee is already in possession of the property and actual delivery is not possible, to Sibendra Pada v. Secretary of State the Government was already in possession of certain lands. The owner, the appellant sold by an oral sale the land to the government for Rs. 17. Later he trespassed and in a suit by the government to evict him, he contended that there was no valid sale as there

was no actual delivery of property, as the sale being oral and the vendee the government have been already in possession. This was upheld, but the later Calcutta cases did not follow this ruling as the essence of delivery of possession is changed.

The above case refers to tangible property of small value less than Rs. 100 and where registration is not essential. Today constructive delivery is enough, but where the vendor is in possession then delivery should be actual. The Madras view is stated in the case of Muthu Karuppan v. Muthu Sembah. Here the mortgagee was already in possession, and the value of equity of redemption was less than Rs. 100/-. There was an oral sate to the mortgagee himself. The sale was held to be valid as constructive delivery is sufficient. But a sale of a reversion has to be effected by a registered instrument only. This view is further emphasised in another case Nagammal V. Krishnaswami reported in (1976) 2M.L.J. Page 72. In this case Natarajan has held that in case of oral sale of equity of redemption of a usufructuary mortgage, no delivery of possession as contemplated by Sec. 54 is necessary when the mortgagee is already in possession.

Section 55 deals with the rights and liabilities of the buyer and seller. These rights and liabilities are those that are implied in an open contract of sale i.e., a contract in which the terms are not Subject to particular conditions. When the terms in a contract are made subject to particular conditions, and these conditions govern the rights and liabilities of the parties we call such a contract as a contract to the contrary in an open contract of sale, all that is set out are the names of the parties the property to be conveyed and the price. In such a contract the implied terms as to the rights and duties of the parties are provided by the law in section 55.

Section 55 enacts - "In the absence of a contract to the contrary, the buyer and the seller of immovable property are subject to the liabilities and have the rights mentioned in the

rules next following or such of them as are applicable to the property sold.

(1) The seller is bound,

(a) to disclose to the buyer any material defects in the property or in the seller's title thereto which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover.

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power.

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect of the property or the title thereto.

(d) on payment or tender of the amount due in respect to the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place.

(e) between the date of the contract of sale and the delivery of property, to take as much care of the property and all documents the title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents.

(f) to give on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits.

(g) to pay all public charges and rent secured due in respects of the property up to the date of the sale the interest on incumbrance on such date, and except where the property is sold subject to incumbrance, to discharge all incumbrance the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same

Provided that, where the sale is made by a person in a fiduciary capacity, he shall be deemed to contract with a buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in the rule shall be annexed to, and shall go with the interest of the transferee as such and may be enforced by every person in whom that interest is for the whole or any part thereof from time, to time vested.

(3) where the whole of the purchase money has been paid to the seller he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power.

Provided that (a) where the seller retains any part of the property comprised in such documents he is entitled to retain them all, and (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be and at the cost of the person making the request, to produce the said documents and furnish such true copies there of or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of the greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled :

(a) to the rents and profits of the property till the ownership thereof passes to the buyer.

b) where the ownership of the property has passed in the buyer before payment of the whole of the purchase-money to a charge upon the property in the hands of the buyer any trans-

feree without consideration or any transferee with notice of the non payment, for the amount of the purchase-money, or any part there of remaining unpaid and for interest on such amount or part from the date on which possession has been delivered.

(5) The buyer is bound :

a) to disclose to a seller any fact as to the nature, extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest.

b) to pay or tender at the time and place of completing the sale the purchase money to the seller or such person as he directs. Provided that, where the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto.

c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller.

d) where the ownership of the property has passed to the buyer as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property the principal moneys due on any incumbrance subject to which the property is sold, and the interest thereon afterwards accruing are.

(6) The buyer is entitled :

a) where the ownership of the property has passed to him the benefit of any improvement in or increase in the value of the property and to the rents and the profits thereof.

b) Unless he has improperly declined to accept delivery Of the property, to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in property, for the amount of any purchase-money prop-

erly paid by ... buyer in anticipation of the delivery and for interest on such amount; and, when properly declines to accept the delivery also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its recession.

An omission to make such disclosures as are mentioned in this section, para (1) clause (a) and para (5) clause (a) is fraudulent.

Before proceeding to a full and elaborate discussion of the section it will be worthwhile to reduce the section into two compartments, viz. the right and duties of the seller and buyer (I) before completion and (2) after completion of the sale.

Before Completion

Seller's liabilities	Buyer's liabilities
To disclose material defects - sec. 55(1) (a).	To disclose facts materially increasing value - sec. 55(5) (a)
To produce title deeds - sec. 55 (1) (b).	
To answer question? as to title- sec. 55 (1) (c).	
To execute conveyance - sec 55 (1) (d).	
To take care of the property - sec. 55 (1) (e).	
To pay outgoings - sec 55 (1) (g)	To pay price - sec. 55 (6) (b).

Seller's right	Buyer's right
To take rents and profits- sec, 55 (4) (a).	charge for prepaid- sec. 55 (6) (b)

2. After Completion

Seller's liabilities	Buyer's liabilities
To give possession - sec. 55 (1) (f)	To bear loss of the property- sec. 55 (5) (c).
Implied covenant for title sec. 55 (2).	To pay outgoing- sec. 55 (5) (d)
To deliver title deeds on receipt of price - sec.55 (3)	
Seller's right	**Buyer's right**
Charge for price not paid - sec. 55 (4)(b)	Benefit of increment - sec. 55 (6) (a)

SELLER'S LIABILITIES BEFORE SALE

Section 55 (1) (a) :

Seller's duty of disclosure of material defects. This applies only to an open contract of sale. As a contract of sale is not a contract *uberrima fidei* the seller is in duty bound to inform the purchaser of any material defects in the property of which the seller is, but the purchaser is not cognisant, and which the purchaser himself could not have discovered. In other words the law makes a distinction between 'latent and patent' defects. Where patent defects are concerned as the ruinous state of buildings, a footpath these can be discovered by ordinary diligence. But latent defects such as those which are exclusively within the knowledge of the seller, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transaction, the seller, is in duty bound to discover for himself with the care ordinarily used in such

transactions, the seller is in duty bound to disclose them to the purchaser. It is rather a statutory duty. There is no duty to disclose the facts of which the buyer has actually constructive notice. As to patent defects and defects of which the seller himself is unaware the maxim caveat emptor applies.

Meaning of material defects :

In Flight v. Booth the facts were, there was an auction of lease of house. The lessee was restricted from carrying on offensive trade such as a coffee house. But there was a stipulation as to inoffensive trade such as fruit vending. But at the auction there was no disclosure as to the restriction or carrying on in offensive trade in the premises. In a suit by the auction purchaser, to set aside the sale on ground of non-disclosure of a material defect; it was held restriction as to other inoffensive trade is a material defect.

Defect in title :

Material defects include defects in title also. The words "seller's title thereto" have been added by the Amending Act of 1929. The rule Caveat emptor does not apply to defect in title. In Carlish v. Salt (1906) I Ch 335 J. observed. Upon consideration of the authorities. I am of opinion that the vendor of real estate is under a similar obligation with respect to a materiel defect in the title or the subject of the sale. Which defect is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions".

In the case of Adhams Hussain. v Cani Veeri Chetty A.I.R. 1953 Mad. 620 there was a sale of property and on area of that property was included in the town planning scheme. On the question whether it is a material defect in the seller's title and whether there ought to have been disclosure of his defect it was held even assuming it as a materiel defect in the sellers title, it is one the buyer can ordinarily discover and therefore there was no duty of disclosure.

A defect of title is one which exposes the purchaser to adverse claims to the property. Such defects are always latent defects Even if there is a stipulation to sell with all faults, a seller is bound to disclose latent defects. The following are some of the defects in title (1) restrictive covenants. (2) encumbrances (3) liability of the property to be compulsorily acquired under the land Acquisition Act (4) an easement (5) partition decrees by which the property was allotted to a co-sharer. (6) title being voidable at the option or a third party. But you must note that even if the defect is constructively within the buyer's knowledge there is no duty to disclose it.

Let us illustrate what has gone before : (1) If A sells to B, a field, but before accepting the conveyance B discovers that the public have a right of way across it of which there is no visible indication on the land. This is a defect both on the property and in the seller's title. As there is non-disclosure of a material defect in title he may refuse to complete the sale and claim damages. He can also resist a suit for specific performance.

After sale In Gajapathi v. Alagia (1886) 9 Mad 89. A sold property to B. After completion of the sale B discovered that a portion of the property had been allotted to C, under a decree for partition. It was held that non-disclosure of the decree was fraudulent to the sale can be set aside.

Misdescription :

If it goes to the root of the contract, the contract can be repudiated. So when the buyer is aware of the defects and yet covenants to contract, he cannot rescind the contract. In Colby v. Gadsdem 34 Bom. 416 where a coal mine was stated to be "Standing on a fine vein of coal" but the purchaser know that the mine had been worked out and exhausted, it was held that the rule of Caveat emptor applies.

Effect of non-disclosure : If the buyer discovers the material defects before sale, he can either rescind the contract, or oppose the suit for specific performance, or sue for damages.

If after sale, he can set aside the sale on grounds of fraud as the last sentence of Sec. 55 states 'omission to make a disclosure' is fraudulent If no fraud is proved then the buyer has only a right for damages.

Section 55 (1) (b) :

Production of title deeds : Whether it is a sale of movables or immovables the seller's duty is to make On a marketable title. This right is given to the buyer by law under this clause seller should produce the documents only on the request of the buyer. So in case there is no request the documents need not be produced. Under. English Law in an open contract of sale the practice is to deliver an "abstract of title" in which there is a summary of documents of title it shows the root of title for a period of 30 years as it stands now by Sec. 44 of the Law of Property Act. 1925

Section 55 (1) (c) :

Answer relevant question: When the documents have been examined by the buyer if he is not satisfied with them it is open to him to make further requisition or objection. The seller is bound to answer all relevant questions. Questions regarding income or rental are relevant. It is always open to the buyer to waive such requisitions.

Section 55 (1) (d) :

Execution of conveyance : The execution of conveyance and payment of price are reciprocal duties to be performed simultaneously in a suit for specific performance the plaintiff must show that he was ready and willing to perform. Where the proper price has been paid, it is the duty of the seller to execute a conveyance at a proper time and place. But what proper time and place are the section is silent for it must be remembered that generally (special cases of excepted) time is not regarded as the essence of the contract. But in case of unreasonable delay it is open for either party to make time as

the essence of contract rescinded by giving notice to the other party. The conveyance can be executed in favour of the buyer or his nomine.

Section 55 (1) (e) :

Care of the property : English law on this liability of the seller was laid down by Lord Coleridge CJ. in 1891 2 Q. B.D. 456 in the case of Clarke v. Ramuz, it was help in this case, that upon a contract for purchase and sale of land though, at law the property in the land does not pass until the execution of conveyance still between the time of contract and the execution of conveyance, the vendor is in the position of a trustee for the purchaser-not exactly the same as a trustee in the ordinary sense, but that he is subject to certain duties of a trustee, one of those being to use reasonable care to preserve the property, as far as may be, in the same state as when the contract was made.

But under Indian law, the seller can be called a trustee only in a limited sense. Under Sec-54 no equitable estate passes to buyer. From this it follows when there is a contract for sale the intending seller does not become the trustee of the property. But there is a period of trustee ship which is limited to the stage after the sale has been completed and before the delivery of possession has taken place, when loss or destruction of title deeds will be a damage done to the property.

In the case of insurance money if the property is destroyed by fire, flood etc. before the sale is completed and after the contract for sale has been entered into under English law by Sec 47 of the Law of Property. Act. 1925 as the relation between vendor and vendee being that of a trustee and cestui-que trust the insurance money received by the vendor must be held by him as a trustee for the beneficial owner i.e., the purchaser. In Indian law, in as much as the buyer gets no ownership over the property on contract for sale, the seller alone bears the loss of all kinds till the sale is completed. Therefore

the seller retains the money till the completion of sale and on completion of sale the buyer gets the amount by virtue of Sec. 49 of the T.P. Act.

Section 55 (1) (g) :

To pay outgoings and public charges : The Seller is bound to pay (i) all public charges accrued upto the date of sale: (ii) the interest on all incumbrance : (iii) the amount (principal) due on incumbrance except where the property is sold subject to incumbrance. Where there are incumbrance and the property is sold free of incumbrance, the buyer can under this clause insist that the obligation should be fulfilled at or before the execution of the conveyance. The buyer is not bound to accept any indemnity from the seller in respect of incumbrance of property sold.

BUYER'S LIABILITY BEFORE SALE

Section 55 (5) (a) :

Buyer's duty to dispose all facts which materially increase the value of the property. You must note here that though the buyer is under a duty to inform only facts which materially increase the value of the property the latent advantages need not be informed, in other words he is not bound to inform the seller the facts which may influence his own judgement in purchasing the property. In Fox v Mackreth, — A, the buyer knows that there was a coal mine in the estate of B, the seller. Without disclosing this fact A purchased the estate of B contended this non disclosure was a fraud and sale should be set aside. The court rightly held that there was no duly to disclose such a fact which merely influenced his Judgement to purchase the property. The buyer should not make misrepresentation that would mislead the seller.

Matters of title :

Where the seller has inadequate knowledge with regard

to his title but the buyer too knows the extent of seller's title it is statutory duty on that part of the buyer to disclose the extent of seller's title in Summers v Griffiths, an old lady who was frail, sick and ignorant sold her property at a very low price believing she could not make a valid title. It happened that the buyer who knew her title was perfect, purchased the property without disclosing to the lady the extent of her title. On the question whether non-disclosure of the perfect title is fraud, the court held that such non-disclosure was fraudulent.

Section 55 (5) (b) :

Payment of purchase-money : Payment of price and execution of the conveyance are to be performed simultaneously. I am referring to clause I (d) : Clause 5 (b) imposes a personal liability on the buyer apart from the liability imposed on the property under Clause 4 (b). The purchaser is bound to pay money in accordance with the direction of the vendor and may retain the benefit of any remission made by such person to whom the vendor directs payment.

If the property is sold free from encumbrance, but it is later discovered that there is a mortgage over the property, and if the buyer is compelled to pay it, the buyer can set of, deduct the amount from the purchase money. Where the buyer undertakes to pay the encumbrances and retains money for the purpose, third parties can look to the buyer and sue the buyer. But where there is no such undertaking the third party proceeds against seller alone.

SELLER'S RIGHT BEFORE COMPLETION OF SALE

Section 55 (4) (a) :

To take rents and profits of a property is an incident of the right of ownership and passes with the transfer of ownership. Consequently until ownership passes the seller is entitled to rents and profits. After completion of the sale then under clause 6 (a) the buyer will be entitled to them.

BUYER'S RIGHT BEFORE COMPLETION OF SALE

Section 55 (6) (b) :

This clause deals with the buyer's charge under 3 categories:- (i) Buyer's charge for purchase money with interest; (ii) for earnest money and (iii) for costs if any, awarded to him of a suit to compel specific performance of the contract.

As the price is liable to be paid only at the time of conveyance, if the buyer has paid any money before completion of sale to the extent of money that he has paid, he gets a charge on the property, which is a right to enforce alien on the property and recover the amount provided there is no fault on his part i.e., if he has not improperly declined to accept delivery. He will lose his right if the other party can show that it was due to the fault of the purchaser that the sale could not be completed, or in other words that the purchaser has improperly declined to accept delivery. This clause itself provides for additional rights which the purchase can exercise if he can show that "he has properly declined to take delivery". For example when he has repudiated the contract because of defective title. So it follows that the buyer loses his charge if he refuses to complete the sale without any justification.

It should be noted however even though due to the fault of the buyer he loses his charge, yet he will be entitled to the return of purchase money because no seller is entitled to the purchase money unless the sale is complete. But not so in the case of earnest money. Here the buyer loses his charge as the earnest money. "Earnest" money is the sum of money paid by the buyer of property under a contract for sale in order to bind the seller to the terms of the agreement for sale. It is termed a deposit in English law and is a guarantee for the performance of the contract That being the case, if the transaction goes forward the earnest money becomes a part of the purchase price. If the buyer defaults then it is forfeited. But if the sale fell through because of the fault of the seller, then the

buyer gets this money back in Dwarakapresa v. Miss Kethleen Florence Burns : A. I. R. 1955 Nag. 38. a test was prescribed to ascertain whether the amount paid was earnest money, and that was to find whether the parties intended the amount paid to be treated, not merely a part-payment, but as guarantee for the performance of the contract.

Persons against whom charge is enforceable :

The Amending Act of 1929 omitted the words "with notice of the payment" from this clause So before the amendment the buyer's charge could not be enforced against transferees without notice. Under the present clause, the charge can be enforced not only against all persons claiming under him. irrespective of notice. The reason for the amendment is that the transferees and legal representatives of the purchaser can escape liability for the amount received by the seller by pleading that they had no notice of the payment of purchase money or a part thereof.

SELLER'S LIABILITY AFTER COMPLETION OF SALE

Section : 55 (1) (f) :

To give possession. It is a statutory duly imposed on the seller to give possession of the property as its nature admits If a house, it is enough to hand over the key-Guest v. Humfrey (1801) E.R.875. Where the seller fails to give possession after the completion of the remedy of the buyer is to sue for recovery of possession and not for specific performance as there is nothing to perform; the executory contract for sale is now an executed contract of sale.

Covenant for title :

Section 55 (2) Under this clause the seller covenant to convey the title in entirely to buyer- An express covenant of title in a sale deed is not necessary, since under the clause such a covenant is implied in every sale of immovable property

and this is so because the covenant for title runs with the land, and a purchaser from a pre emptor is entitled to the benefit of this covenant. This clause includes all the covenants for title implied under English law which are :

1. the seller has power to convey the same :

2. the land is free from encumbrances :

3. the buyer shall have quiet enjoyment : and

4. the seller shall do all further acts necessary to assure the land to the buyer.

It is note worthy that this clause is an exception to the rule of caveat emptor because, whether the warranty for good title is covenanted in the contract or not the seller is liable for the breach of it as the warranty is absolute and unless there is a clear contract to the contrary, the seller will be liable.

Nature of covenant :

As the covenant for title runs with the land and person in possession of the property i.e, even subsequent transferees can enforce it against the original seller. But the covenant does not extend to disturbance by trespassers. Although quiet enjoyment is not expressly mentioned. it includes covenant for quiet enjoyment and it becomes enforceable if there is obstruction or dispossession. On the question as to when it arises there is difference of judicial opinion. The Calcutta view seem to be as expressed in Jyofi Prasad Singh v H.F. Low & Co., that the covenant for title arises only on completion of sale-Rankin C.J. But the Madras view in 40 Mad. 338-Adikesavan v. Gurunatha was that the covenant for title apples both to the contract for sale, and the completed sale-Abdul Rahim, J. It was applied in Sivamani v Munibadra 49 M L.J 688 The Allahabad view is also the same-A I R.1951 AH 93 (F. B), Deep Chandra v. Ruknudaula.

In conclusion I may state that before the sale is completed no buyer is entitled to an absolute guarantee of title and can insist only on title free from reasonable doubt. His remedy for damage, is founded upon the breach of contract. After the conveyance, the buyer's suit for damages is based on the breach of covenant.

In a sale by a person in fiduciary character, the implied covenant is a limited one, in the sense that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it. Generally in order to exclude this liability whether the actual owner or person in fiduciary character transfers the property the seller should show a contract to the contrary Where there is a covenant in the sale deed that the seller will not be liable for any defect in the property, it will be a contract to the contrary.

Section 55 (3) To deliver documents of title : If the seller retains any part of the property he is entitled to retain the entirety of deed or deeds relating to the property. But the buyer has a right to production of the documents for inspection

BUYER'S LIABILITY AFTER COMPLETION OF SALE

Section 55 (5) (c) :

To bear loss and section 55 (5) (d) -to pay encumbrance and charges, These liabilities have already been dealt with and there is only point to be cleared. Supposing the encumbrance created by the seller before the sale turns out to be invalid and the property is sold subject to the encumbrance. Who is to enjoy the benefit of it. In the leading case of Izthurnisa Begum v. Kunwar Pratap Singh. 36 I. A. 203 P.C., the Judicial Committee held "after the purchase is completed the seller has no claim to participate in any benefit which the purchaser may derive from his purchase". For this reason the buyer will be entitled to that benefit. But where the property is sold free from encumbrances and the buyer retains some amount of the

price to pay off these encumbrances, and in case the encumbrances turn out bad the amount so retained by the buyer must be returned to the seller, because, it forms part of unpaid purchase money.

RIGHT OF SELLER ON COMPLETION OF SALE

Section 55 (4) (b) :

Unpaid vendor's lien. This clause is to the effect that where the ownership has passed to the buyer and the seller is yet to be paid partly or fully the seller gets a charge on the property provided two conditions are satisfied and they are, firstly the ownership ought to have passed it to the buyer and the purchase price remains unpaid. This right for a charge is called the equitable lien of unpaid vendor. Where as under English law the charge arises even at the stage of contract for sale. Under Indian law it arises only when the ownership passes on the completion of sale.

Where the second condition is concerned, problems arise. As a sale is transfer for a price paid or promised or part paid and part promised the promise itself is the consideration and there is no question of unpaid purchase money. Therefore there is no question of a charge. So the student has to make a distinction between cases of a sale in consideration of a sum of money covenanted to be paid and cases of sale in consideration of a covenent to pay a sum of money in future. In the later case there is no scope for charge.

In (1939) Rang.46, Johnson v. Official Liquidator Rangoon where the buyer agrees to transfer certain shares of the company there is no question of any purchase money and it is case of convenant to pay. In 31 Cal. 57 (P.C) Webb v. Macpherson. Lloyd sold a tea estate to Macpherson in consideration of Rs. 80,000/- Rs. 30,000 was to be paid in cash and balance by annual installments for which Macpheraon executed an undertaking. The sale was completed. The annual instal-

ment was not paid. So, Webb, the executor of Lloyd brought a suit for declaration that he has charge over the estate to the extent that was not paid. It was held (i) Sale is in consideration of a sum of money part paid and part promised, the payment of which is deferred; (ii) it is not a sale merely in consideration of the covenant or undertaking, to pay in future; (iii) there is a charge for the unpaid amount- (iv) no charge is excluded unless there is a contract to the contrary. The charge is not excluded by reason of deferred payment.

Nature and extent of Charge :

The charge both under English and Indian law is non-possessory and once title has passed to the buyer, the seller can neither sue for recovery of possession nor resist the buyer's suit for possession. The charge extends to the interest on such amount as has still to be paid to the seller. The charge being a personal right of the seller cannot be enforced against the purchaser's transferees for value and without notice of the seller's lien.

BUYER'S RIGHT AFTER COMPLETION OF SALE

Section 55 6) (a), (c) :

Rights to rent and profits : Prior to sale the seller is entitled, after sale the buyer is entitled clause (4) (a) Clause (1) (e) deals with insurance money, which we have already dealt with.

MARSHALLING BY SUBSEQUENT PURCHASER

Section 56 says :

"If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold to him, so far as the same will extend but not so as to prejudice the rights of the mortgagees or

persons clain ıg under him or of any other person"who has for consideration acquired an interest in any of the properties". The section shall be dealt very elaborately later On when take up the doctrines of marshalling and contribution under mortgages.

MORTGAGE OF IMMOVABLE PROPERTY

Before going through the relevant sections of the Transfer of Property Act dealing with mortgages let me trace for briefly the history of mortgages. In ancient Roman Law, three kinds of mortgages were known. They were the fiducia, the pignus and the hypotheca.

Fiducia :

The property was transferred to the creditor, with a condition for reconveyance of the property to the debtor on repayment of the loan.

Pignus :

Here the property is transferred to the creditor, who enjoyed it till the debt was repaid. This more or less corresponds to our usufructuary mortgage.

Hypotheca :

It was the perfect form of mortgage known to Roman Law. Here the property is retained by the borrower, buts kind of security is created in favour of the creditor. This corresponds roughly to our simple mortgage.

Meaning Of Mortgage And English Law :

The word "mortgage" is derived from the two French words 'Mort and 'Gage', meaning thereby 'a dead pledge'. It came to be called so because in the early days the entire property was transferred to the creditor who had enjoyed the rents and profits and so far as the debtor was concerned the property was deemed to be lost. They were classified into two categories as : vivum vadium and (2) mortuum vadium.

In vivum vadium, the creditor was to appropriate the fruits in discharge of both the principal amount and the interest and so the pledge was considered as living, because thus the property worked its own redemption.

In Murtuum vadium the arrangement between the creditor and Pebtor was that the profits should go in reduction of interest only the principal remaining unpaid, the property is deemed to be lost or the pledge is a dead one. Under English Common Law if the loan is not repaid by the borrower within the stipulated, then the borrower cannot recover the property at all it was the rule of forfeiture. But equity mitigates the hardship of this rule by recognizing a salutary rule which lessened the burden of the borrower to a great extent. Contended that '"once a mortgage always mortgage" and allowed the redemption had passed. The Law of Property Act, 1925 has substantially altered the law regarding mortgages and the most important change is that the borrower need not transfer the property to creditor. It is enough if an encumbrance is effected on the property, the mortgagor himself retaining possession.

DEFINITION OF THE TERMS INVOLVED IN MORTGAGES AND KINDS OF MORTGAGES: SECTION 58

Section 58 : "(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called the mortgagor, the transferee a mortgagee: the principal money and interest of which payment is secured for the time being are called the mortgage money and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly, that in the event

of his failing o pay according to his contract, the mortgagee shall have right to cause the mortgaged property, to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Where the mortgagor ostensibly sells the mortgage property on condition that on default of payment to the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale. and the mortgages a mortgagee by conditional sale.

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the motgaged property to the mortgagee and authorises him to retain such possession until the payment of the mortgage money, and to receive the rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage, the transaction is called an usufructuary mortgage and the mortgagee an usufrtuary mortgagee.

(e) Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage.

(f) Where a person in any of the following towns namely the towns of Calcutta, Madras and Bombay, and in any other

town which the State Government concerned may, by notification the official Gazette, specify in this behalf delivers to a creditor or his agent documents of title to immovable property, with intent to create a security, thereon, the transaction is called a mortgage by deposit of title deed.

(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called anomalous mortgage.

Definition of mortgage :

Now let us proceed to study the section in detail. Section 58 (a) deals with the definition of a mortgage and meanings of important terms. In our law a mortgage is nothing more and nothing less than a 'pledge of specific immovable property for repayment of money or money's Worth. Mahmood J said in Gopat v. Parsotam 5 All. 121 "Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in Sec. 58". Under this definition two essentials are seen and they are : -1 mortgage is a transfer of an interest in specific immovable property and 2. The transfer should be by way of security for an existing or future debt or monetary liability.

1. Transfer of interest : There is only a transfer of interest. But such interest itself is immovable property. The nature of the right transferred depends upon the form of the mortgage, but it is never the whole interest of the mortgagor in which case it will be a sale. The characteristic feature of mortgages is that the right in the property created by the transfer is accessory to the right to recover the debt. The right being a right to immovable property is a right in rem. There must be a transfer of an interest, otherwise, that transaction will not be a mortgage. Therefore where the undertakes not to alienate his, property till the debt is repaid such transaction is not a mortgage-39 245 F. B Mohoanlal v. Indomati.

A mortgage involves the transfer of an interest which cannot be said to be charge which is nothing but a security of property without any transfer of interest. Therefore there are points of similarity and dissimilarities between the two.

MORTGAGE : SEC. 58	CHARGE : SEC. 100
1. Transfer of interest, *jus in rem*	No transfer of interest *jus adrem*
2. Can be created only by act of parties	Either by act of parties or operation of law.
3. In a mortgage there can be a personal covenant to pay	There is no personal covenant to pay the holder as to took the property only.
4. A mortgage secures the payment of a loan.	A charge need not necessarily secure any debt or loan, e.g. a charge for maintenance
5. Can be enforced against a transferee with or without notice.	Cannot be enforced against a transferee for consideration without notice.
6. A mortgage can be redeemed	That is not necessarily the case with a charge.
7. A mortgage is for limited period.	Charge may be in perpetuity.

Specific Immovable Property :

The property intended to be mortgaged must be so described that it can be identified and or recognised easily, in Darshan Singh v. Hunwanta. I All. 272 "a mortgage of my house and landed property" was held to be void for uncertainty.

2. The transfer should be byway of Security etc : A mortgage is created for the purpose or securing a debt or other obligation. Therefore it follows that there is a subsisting debt: so a trans-

fer by way of discharging a debt is not a mortgage-25 All 115 (PC) Nidhah v. Murti Dhai.

Consideration in Mortgage :

A mortgage must be supposed by consideration for without consideration a mortgage becomes unenforceable and no charge can be created on the property. In Kumarappan v Narayanan a Madras case-35 I.C. 455 (Mad), it Was held that a mortgage where there is no consideration is a nullity From clause (a) of the section it is quite clear that consideration of a mortgage may be either (1) *money advanced or to be advanced by way of loan* : (2) an existing or future debt ; or C3) the performance of an engagement giving rise to a pecuniary liability.

(i) Money advanced : It includes "existing debt" and something more-even one barred by limitation or otherwise irrecoverable ; where as "existing debt" means a debt which is not so barred.

To be advanced :

A mortgage may be created, not only for an existing debt but also as security against advance to be made in future, for example to secure a current account, between the parties up to a limit named-a running security.

(ii) Future Debt : A bond executed and property security given for securing the costs of the respondents in England, in a matter before the Privy Council was held to be a valid mortgage this being to secure a future debt a contingent liability which might become due from the appellants to the respondents—Tokhan v. Girwar-32 Cal. 494.

(iii) Pecuniary liability : It may also mean a legal obligation to pay damages whether liquidated or not. An illustrative case on this is the case of Ramchand v Iswar Chandra, 48 Cal, 625 FB. The facts of the case were, the defendant borrowed paddy from the plaintiff and executed a bond agreeing to pay paddy interest thereon (payable in paddy). By way of security for the

realisation of paddy, he mortgaged certain immovable properties. The bond provided that on default of payment of paddy the plaintiff would be entitled to realise the claim with interest thereon by sale of the mortgaged property. On the question whether the transaction was a mortgage it was held :

(i) the transaction is a mortgage;

(ii) the essence of the transaction was the land which was made security for the value of the paddy;

(iii) failure to deliver paddy will entitle the mortgagee to recover the price thereof by sale of the land and

(iv) so the parties entered into, an agreement which if not performed by delivery of paddy, would give rise of a pecuniary liability. Where only part of the consideration has been made, the mortgage is entitled, to a lien on the mortgaged property to the extent of amount advanced. The mortgagor cannot sue for the balance, only for damages for breach of agreement and may redeem immediately on payment of the amount actually received.

Agreement to Mortgage :

Under English law it may amount to an equitable mortgage, but no such right is created under Indian law it gives rise only to a personal obligation and it is not capable of specific performance for the court will not enforce an agreement to make a loan of money whether on security or not. The remedy is damages.

Mortgagors and Mortgagees :

Under Section 59 A includes a person deriving title under a mortgagor or mortgagee as the case may be. Section reads as follows. "Unless otherwise expressly provided reference in this chapter to mortgagors and mortgagees shall be deemed to include references to persons to deriving title from them respectively".

SIMPLE MORTGAGE—SECTION 58 (b)

Characteristics of a Simple mortgage :

1. There must be a loan.
2. There is a personal liability to pay.
3. Possession is not delivered.
4. There is no foreclosure (Sec 67)
5. No power of private sale, but sale only through Court Sec. 67, Right of private sale can be reserved expressly but to Subject to Sec. 69. (b) and (c).

In a simple mortgage possession is never delivered the mortgagor himself retains possession and agrees that in default of his non-payment of loan that mortgagee shall have the right to have property sold through court This right of mortgage is inherent in the simple mortgage itself and so this power of sale need not be expressed. But it should be exercised only through court.

There is always personal covenant to pay. The existence of his personal covenant or liability is the essence of a simple mortgage and it is this element which distinguishes a simple mortgage from a charge. So it can be said that a simple mortgage is a contract creating a personal obligation to repay the loan.

Let us now see a few personal covenants : (a) In Sivakami Ammal v. Gopala 17 Mad. 131 F.B. the covenant was "I shall pay the amount in Chitrai 1883". (b) In Kangaya Gurukal v. Koti Muthu 27, Mad, 526 the convenant read as : On the 30th Pangun Bhava year causing the above said Rs. 200/- to be paid we shall redeem our land" (c) In Mamoona Labbai v. Ramanatha (1946) I.M.L.J 90 it was "On expiry of the stipulated period I shall pay the amount and redeem the land"- These are all personal covenants where the mortgagor binds himself to discharge the debt.

So we find in a simple mortgage security for a debt is two fold : (1) the personal obligation and (2) the property and it should be noted that a personal covenant carries with it by necessary implication a power of sale So the remedies are also twofold; (1) The sale of the hypotheca through court. The words 'cause the mortgaged property to be sold" imply that the property has to be sold only through the intervention of court.

[i] It should be noted that this right to cause the property to be sold subsists in the mortgagee from the time of the mortgage until the debt remains unpaid; and [ii] On the personal covenant, the mortgagee can obtain a simple money decree and proceed against him personally. These two remedies may be exercised concurrently or separately.

MORTGAGE BY CONDITIONAL SALE—SECTION 58 (c)

The Characteristics of a mortgage by conditional sale:- are the following:

1. The mortgagor ostensibly sells the mortgaged property The transaction has the appearance of a sale, but is really not a sale.

2. The condition is that the sale shall be absolute in default of payment on a particular date or the sale shall be void on such payment and the property retransferred.

3. The remedy of the mortgagee is by foreclosure and not by sale. (Section 67)

4. It must be created by one document and not by two documents i-e one for sale and the other for repurchase, [provision to Section 58 (c)] .

5. It must be by a registered instrument if the consideration is above Rs. 100/- and if it is Below Rs. 100/- either by delivery or registered instrument (Section 59)

Before we proceed to analyse the characteristics of a mortgage by conditional sale, we have to draw a distinction between this kind of mortgage and a transaction which is a sale with a clause or option to repurchase, however rare such a transaction may be here in India.

DISTINCTIONS BETWEEN A MORTGAGE BY CONDITIONAL SALE AND SALE WITH A CLAUSE TO REPURCHASE :

1. In the case of a sale with option to repurchase the ownership of the property vests immediately in the transferee, but if it is a mortgage the ownership never vests immediately in the transferee so the transferee can never exercise rights of ownership over the security.

2. In a sale once it is completed, there is no manner of relationship so for as the property is concerned between the parties concerned let alone that of a creditor and debtor: but in a mortgage there is a debt and the relationship is that of debtor and creditor.

3. In the case of sale, time is the contract. That is to say, if the vendor does not pay the consideration and repurchase the property within the stipulated period, the option to repurchase is lost forever. But time is not the essence of the contract in a mortgage and so the mortgagor can redeem the property even after the due date provided there is no contract to the contrary.

4. In the case of sale, the option can be exercised only by the vendor, as it is a personal right not being assignable, whereas in the case of Sinna Karuppan v. Karuppaswami (1965) II M.LJ the Madras High Court held the benefit of the contract in a sale with option to repurchase is assignable and the assignee could enforce the option for his benefit. But it is submitted that this is not a correct decision.

Prior to the introduction of the proviso to clause (c), the mortgage by conditional sale was effected by means of two documents one being a sale-deed, and the other containing the condition for reconveyance, and so frequently doubts arose whether the transaction was a mortgage by conditional sale or sale with an option to repurchase. Therefore the courts developed a number of tests to determine the nature of the transaction. If possession was delivered the presumption is a sale. If there was provision for the payment of interest or if the vendee, had to account to the vendor for the rents and profits of the property, then it could only be a mortgage. If the relationship between the parties was that of creditor and debtor and the consideration was grossly inadequate then it is mortgage. But the best general test as nature of the transaction is the intention of the parties.

As to Proof of intention :

Oral evidence was admissible in the early days. But after the passing of the Evidence Act, Section 92 made it a rule that no oral evidence can be let in so as to run inconsistent the terms of the contract, embodied in a document. But the courts allowed oral evidence inspite of the clear terms of Section 92. This was condemned by the Privy Council in Palakrishnan DAS v.Legge. 22 All. (P.C) 159. The Supreme Court gave effect to this rule in Chuchun jha v. Ebada AH, A.I.R. 1954 SC 345. where in it was held "If on the face of it an instrument clearly purports to be a mortgage, it cannot be turned into a sale by reference to extraneous and irrelevant consideration." So it is now firmly that as between the parties to the document the intention to treat it as an out and out sale with an option to repurchase or a mortgage by conditional sale has to be decided on a consideration of the contents of the document themselves with such extrinsic evidence of surrounding circumstances, as may be required to show in what manner the language of the documents is related to existing facts. Oral evidence is not admissible.

Effect of proviso :

The proviso lays down two things: (1) "The mortgage by conditional sale should be effected by one clocuments; and 2) the condition which converts the sale into a mortgage must be embodied in the document so that no extrinsic evidence will be admissible to prove that a document which purports to be an absolute sale is in reality a mortgage. But the mere fact that there is only one document and the condition to repurchase is contained in the same document, will not render it into a mortgage unless there is a relationship of debtor and creditor between the parties.

Remedy of the Mortgagee :

It is foreclosure under Section 67. When repayment is not made within the stipulated time, the contrast exhausts itself and the transaction is closed and becomes one of absolute sale to be enforced by foreclosure From that it follows that the creditor can look the land pledged to him for the satisfaction of his debt. As the decree for foreclosure is the only remedy to which the creditor is entitled, he takes the land in satisfaction, and if it is worth more or less than what is due the benefit or the burden of it is that of the mortgagee, who sues for foreclosure. But until a final decree for foreclosure is passed, the mortgagor can redeem.

USUFRUCTUARY MORTGAGE-SECTION 58 (D)

When we analyse the clause dealing with this kind of mortgage find it has certain special characteristics. Firstly, there is delivery of possession of hypotheca to the mortgagee. Secondly, the condition in the mortgage is to retain possession, until repayment of the money due, and to receive the rents and profits out of the property, in lieu of interest or in payment of the mortgage money or partly in lieu of interest and partly in payment of the mortgage money From this it follows that the essential feature of a pure usufructuary mortgage is that the

mortgagee cannot sue for the payment of his debt, but is only entitled to remain in possession of the mortgaged property till the principal and interest are defrayed according to the terms of the agreement.

The words "until payment of the money" no time can be fixed as to the period during which the mortgage is to subsist, if a definite time is fixed it is not an usufructuary mortgage. It is an anomalous mortgage.

If the usufructuary mortgagee is not put in possession, then he can sue for possession. Under section 68, he can get a decree for the amount lent by him. In Ramanathan Pillai v. Annamalai Chettiar and another (1963) 1. M.L.J. 263 it was held that when usufructuary mortgagee has not been put in possession of the mortgaged property, he can exercise his statutory right under Section 68 (i) (d).

Thirdly, there is redemption when the amount due is personally paid or discharged by rents and profits received : fourthly, there is no remedy by sale or foreclosure and fifthly, if the consideration is Rs. 100 or above it must be registered, if below Rs. 100 either by a registered deed or by delivery of property.

Delivery of Possession :

This element is the most distinguishing feature of an usufructuary mortgage and it distinguishes from a simple mortgage. In A.I. R.1925 P.C 63 Maina Bidi v. Chaudri Vakil Ahmad the Privy Council drew a clear distinction between an usufructuary mortgage and an ordinary mortgage; "The main difference between an usufructuary mortgage and an ordinary mortgage is that in the former it is the part or initial agreement by which the security is created that the mortgagee shall at once go into possession of mortgaged property and apply the proceeds, he may derive from the use and occupation of it to discharge the mortgage debt. While in the case of an ordinary mortgage of the usual sort it is in general, not the initial intention of the parties. That the mortgagee should go into possession of the property or

at all although he is empowered to do so if the interest on the mortgage money be not paid," This quite clear. In a simple mortgagee, the initial bargain cannot be delivery of the property to the mortgage than it is no more a simple mortgage, it becomes an anomalous mortgage But possession can be made contingent on failure to pay interest or principal in which case it is still a simple mortgage.

The delivery of possession may be constructive. Where mortgagor is not in a position to give immediate possession it is sufficient if he gives right to possession Prior to 1929, the Madras High Court in Mad. 259 F.B. Subbamma v. Narayiya held that possession must be actual. If the mortgagor failed to deliver actual possession then the mortgage was not usufructuary. But this view has been overruled by the Amending Act of 1929; which provisions that it is sufficient if the mortgagee is entitled to possession under the terms of the deed. This has been made so by adding the words "or expressly or by implication binds himself to delivery possession".

As an usufructuary mortgagee has the right to the exclusive possession of the property began - exclude even the mortgagor. If he does not get possession his remedies are - (1) to sue for possession or (2) for damages for the money lent under section 68.

It is indefinite in duration and there is no personal liability. So it is called vivum vadium.

English mortgage :

Section 58 [e] : An analysis of this clause shows that the mortgage called English mortgage has the following characteristics :

i. It is accompanied by delivery of possession.

ii. There is a personal covenant to pay the amount.

iii. It is effected by absolute transfer of property with a provision for re-transfer in case of repayment of the amount.

iv. The remedy is by way of sale. (Section 69) and not by foreclosure.

v. The power of sale out of court viz, private sale-is co ...red on certain persons under certain circumstances (Se... ..1.69).

The Madras High Court in *Narayana v. Venkataramana,* 25 Mad 220 FB, stated the three essentials of an English mortages. 1) The mortgagor should bind himself to repay the mortgage money on a certain day (Personal liability). 2) The property mortgaged should be transferred "absolutely" to the mortgage (absolute transfer) 3) The "absolute" transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon repayment of the mortgage money on the date on which the morrgagor bound himself to repay the same (Provision for reconveyance)-

Personal Liability :

Where the intention is to create an English mortgage a personal liability will be presented. The person covenant must be to repay the money on a certain date. The object. of fixing a certain date for repayment is that it should be certain. as to when the mortgagor may redeem and the mortgagee is going to exercise the power of sale.

"Absolute Transfer" this clause (e) must be read subject to cluase (a) of the section, and consequently an English mortgage can hardly be regarded as the transfer of the entire interest of the mortgagor to the mortgagee. Some state is left in the mortgagor and only interest thereson is transferrd to the mortgagee. 'Absolute transfer only in form and not in reality. The meaning of "absolute" transfer came up for interpretaion before the Privy Council in A.I.R. 1939. P.C. 14 Ramkinkar v. Satya Charan. The facts of the case were as follows : A had leased out his properties to B for a period of 99 years. B mortgaged by an English mortgage his lease-hold to X. The question arose whether there was any privity of estate between A, the lesson and X the mortgagee, as to make X liable for burden of the lease.

In the above case if there was an "absolute" transfer from the lease, to the 'English' mortgagee then there would be privity of contract between A and X. It is not an 'absolute' transfer when there is no privity and consequently no liability on X.

The Privy Council held- (i) Section (e) Cannot be construed as declaring an English mortgage to be an "absolute transfer' of property. But it merely declares that such a transfer would be absolute, were it not for the provison for retransfer. (ii) This clause does not determine what legal effect follows from the particular form of words; it merely prescribes the form of words necessary to constitute what is known as an English mortgagee, (iii) This clause deals with the form and not substance (iv) The substantial rights are within section 58 [a] and 60 (Right of redemption) (v) Whatever form is used. nothing more than an interest is transferred and the interest is subject to the right of redemption.

According to the proviso for reconveyance, when the mortgage amount is repaid on the stipulated day, the mortgagor can redeem the property. The remedy of the mortage in case the mortgager Commits default in payment is sale either through court or private sale under Section 69.

EQUITABLE MORTGAGE OR MORTGAGE BY DEPOSIT OF TITLE DEEDS : SECTION 58 (f)

An equitable mortgage is as much a legal mortgage as any other mortgage having received statutory recognition under clause (f). its characteristics are:

It is created in the towns of Madras, Bombay. Calcutta and in those notified by the State Government from time to time. Madurai Coimbatore, Tuticorin and Thiruchirapalli It is effected by the deposit of documents relating to title.

There is no delivery of possession of the property.

The deposit is by way of security for existing or future debt.

d) No registration is necessary (Sec. 59)

e) Remedy is by sale and not foreclosure.

f) All the provisions that apply to a simple mortgage will apply to an equitable mortgage.

If an equitable mortgage is executed outside those towns specified, it is invalid and gives no right to the mortgagee to proceed against the properties comprised in the mortgage. But the property mortgaged may be situated outside those towns.

It is very essential that there is a delivery of documents of title and that such delivery should be to the creditor and with the intent to create a security thereon. The deposit of the title deeds should be in one of the commercial towns specified. What is deposited must be the title deeds and are material evidence of title. So it follows patta of land and share certificates as are title deeds, but a map of the property or tax receipts are not documents of title.

SCOPE OF SECURITY IS THE SCOPE OF TITLE

In an equitable mortgage very often the question arises as to the scope of the security. Prima facie on a delivery of title deeds the presumption is that the whole of presumption is controlled by the observations of the Privy Council in A.I.R. 1916 P.C. 114, Pranjivands v. Chan Maphee in this case it was held.

i. Where title of property are handed over with nothing said except that they are to be security, it supposes that the scope of the security is the scope of the title.

ii. Where, however titles handed over accompanied by a bargain that bargain must rule (iii) Lastly, if the bargain is a written bargain it alone determines the scope and extent of the security.

It must also be noted that if the parties intended the bargain to be reduced to writing and the consideration is Rs.

100 and upwards, then there must be registration not if the document is merely evidemce of the deposit of the title deeds.

Delivery of the documents should be made to the creditor or his agent. The words "Creditor or his agent" show that there must be a debt before a deposit of deeds can constitute a mortgage. But a deposit can be made not only for an existing debt but also for further sums to be advanced in future. The delivery should be with an intent to create security. So it follows mere possession of documents of title by the creditor, without evidence of mortgage, will not create an equitable mortgage.

On the question whether constructive delivery of title deed will be sufficient tha Supreme Court in Nathan V. Maruthi Rao and others (1954) II M.L.J. 162 S.C. held that physical delivery of title deeds by the debtor to the creditor is not the only mode of deposit. It can be constructive also where the creditor is already in possession intention to treat it as security is essential.

REMEDY OF THE EQUITABLE MORTGAGEE

English Law : Foreclosure,

Indian Law : Judicial sale - same as in a simple mortgage

ANOMALOUS MORTGAGE : SECTION 58 (g)

The following four forms will be anomalous martgages (i) a combination of simple and usufructuary; (ii) combination of mortgage by conditional sale and usufructuary; (iii) local mortgage such as Otti, Kanom (iv) other miscellaneous forms. In all these cases the remedy of the mortgagor, will either be sale, or foreclosure as the terms permit. If the Value is Rs. 100 or over it must be registered. If below Rs. 100 either by registered instrument or delivery of possession.

Lesson - 5

Mortgage when to be by Assurance

Section 59 lays down :

"Where the principal money secured is one hundred rupees or upwards, or mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by atleast two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid; or (except in the case of a simple mortgage) by delivery of the property".

All that has to be noted here is that in a simple mortgage the mortgagor never parts with possession. So a simple mortgage has to be necessarily registered. In the absence of a contract to the contrary the completion of the mortgage does not depend upon the payment of the consideration. The transfer takes effect on execution of the deed, and where a deed is not necessary, when possession is delivered. Where registration is valid, but there is no registration or the registration is invalid, then the mortgage deed does not even operate a charge. But the Privy Council held in *Varatha Pillai V. Jeevarathinammal* (1919) 43, Mad-244 that the unregistered deed is admissible in evidence for a collateral purpose to prove the nature and character of possession. This was a case of a gift. Where there was an unregistered gift deed but possession was delivered to the donee. The donee was able to prove possession under the deed and as she had been undisputed possession for over twelve years, she had prescribed for herself a good title to the property. Where a document has to be registered then on registration it takes effect from the date of execution. Section 59-A,

merely says that the terms 'mortgages' and 'mortgagees, include persons deriving title from the respectively.

Rights and Liabilities of Mortgagor (Secs. 60 to 66) :

Doctrine of redemption :

Section 60 deals with the most important right of the mortgagor. This right is the right to redeem, it is a statutory right and not subject to a contract to the contrary, which means the mortgagor cannot contract away his right to redeem.

Section 60 says :

"At any time after the principal money has become *due*, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money to require the mortgagee (a) to deliver to the mortgagor, the mortgage deed and all documents relating to mortgaged property, which are in possession or power of the mortgagee (b) Where the mortgagee is in possession of the mortgaged property, to deliver possession there of to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct or to execute" and where the mortgage has been affected by a Registered instrument to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgage has been extinguished.

Provided that the right conferred by this section has not been extinguished by the parties or by decree of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption,

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees, has or have acquired in part the share of a mortgagor.

The section opens with the words "At any time after the principal money has become due". The question is when is it time or redemption of the mortgage?

1. When no time has been specified in the mortgage :

The mortgage money becomes due from the date or execution and so the right of redemption is available from the date of execution; the mortgagee likewise is entitled to enforce his security at once. The exception is a usufructuary mortgage, where till the mortgagee appropriates the rents and profits a suit for redemption is premature.

2. When payable on demand :

Where it is stipulated the mortgage amount will become due only on demand, it will be due only when actual demand is made and the mortgagor may redeem that date on words. In Venkataswami Chettiar v. Ramalingam A.I.R. 1945 Mad. 157 it was held that this demand for payment be clearly expressed

3. Where terms are fixed for redemption :

In *Krelinger's case* 1914 AC 25. Lord Parker of Waddington held that 'till the specified date has passed, there was no right : to redeemable and a bill either to redeem or foreclose would have been redeemable". From this it follows so long as the right to enforce the mortgage security does not arise the right of redemption does not also arise in other words, *"Redemption and for closure are co-extensive"*. These rights one in the mortgagor and the other in the mortgagee arise at the same time and the exercise of one of the rights puts an end to the other of them.

Indian Law .

The Indian law on this is also the same section 60, gives effect to this principal or doctrine that the right of the mortgagor to redeem and the right of the mortgagee to enforce the mortgagee are co-extensive.

By the Amending Act of 1929, the word "due" has been' substituted for the word "payable in Sec. 60 in the last paragraph the word "only" has been inserted to overrule case which have erroneously held that a surrender by, a mortgagee of a part of this security destroys the integrity of the mortgage, and justifies partial redemption..

When the Transfer of Property Act has enacted in 1882, the word was not "due" but "*payable*" so the question arose when the mortgage amount said to "*Payable*"? The Court had to decide whether it became payable even before the expiry of the period so as to enable the mortgagor to redeem even before the expiry of the term Now where the mortgagor covenated to pay writing a specified period the question was whether the mortgager can redeem even before the period In *Roseammal V.R. Jaratling* 3 Mac. 33 it was held (i) that the mortgagor : could redeem the property any time before the expiry of the term because he was *payable within the specified period,* but (ii) the mortgagee however cannot enforce the security, before the specified period elapses because the mortgage money does not become due till the expiry of the period. This decision was overruled by a Bench decision in 27 M.L.J. 483 *(Pir Mahmed v. Nagoor Rawther)* But the Calcutta High Court followed the ruling Rosemmal's case.

To put at rest this conflict of decisions, section 60 was amended and the word "due" was substituted for the word" Punjab and the result was the rights of redemption and foreclosure were made co-extensive. This means that the mortgagor cannot redeem the property so long as the corresponding right

of mortgage, than of foreclosure, is not available to him. So the rights arise, simultaneously. Even where there was partial payment of the consideration this doctrine of co-extensiveness is applicable. Exceptions to the Rule of Co-extensiveness

1. Agreement to Accelerate Due Date :

It is always open to parties to stipulate that on the happening of a certain event or contingency the mortgages money shall become due at once, even though the due date fixed in the mortgage deed has not arrived : e.g. the interest payable is in arrears for say, three months. Such stipulations are for the benefit of the mortgage" and perfectly valid.

2. Clauses accelerating redemption:

It is always open to the parties to stipulate that the time for redemption may be exercised at any time within the specified time. This is for the benefit of the mortgagor.

DOCTRINE OF EQUITY OF REDEMPTION

Meaning of "Once a Mortgage always a Mortgage" in English law :

The most important right possessed by the mortgagor is the right to redeem before it is foreclosed or the estate is sold by the mortgagee. The right to redeem being the essence of a mortgage, courts of equity in England did not permit any decree or contrivance designed or calculated to prevent redemption.

In Vernon v. Bethel, it was held that this doctrine *once a mortgage always a mortgage* was originally invented to protect impecunious landowners from the wiles and crafts of unscrupulous money-lenders On repayment of money the mortgagor could always redeem and rescue what equity still regarded as his own, any contract to the contrary not-withstanding. A con-

dition that a mortgage shall, not be redeemable was therefore treated as a repugnant conditional inconsistant with the idea of security. This doctrine is also, a logical chorally of the contract; for the protection which He law throws round the mortgagor might be rendered wholly illusory if the right to redeem could be limited by contract between the parties.

Indian law before the T.P. Act :

The tendency to apply this doctrine to Indian cases was decried by the Privy Council in Thambuswami v. Hussain. It held that the strict rule of forfeiture should not be applied, but added that since, a practice has grown up to apply this doctrine in practice the doctrine may be given effect to.

Under Transfer of Property Act :

Section 60 laid down that this redemption can be claimed when the principal money becomes due and the right subsists until put an end to in due course of law. *In Muh Sher Khan v. Swamy Dayal* 44 All. 185 a question came before the Privy Council whether section 60 applied to an anomalous mortgage or is it governed by its terms only, in this case the mortgage provided that the mortgagor can redeem only at the end of 5 years. On failure the mortgagee was entitled to remain in possession for a period of 12 years and the mortgagor cannot redeem for that period of 12 years. It was held by the Privy Council : 1. The statutory right to redeem accrued under section 60 at the end of The 5 years period. 2. The term in the mortgage deed that provided against redemption for a period of 12 years hinders the right to redeem and is invalid The result was section 60 was made applicable even to an anomolous mortgage.

As seen already the right of redemption of the mortgage has been the subject of anxious protection in law : so any clog on redemption is not recognised. This section is not subject to a contract the contrary" Therefore a mortgagor cannot by

any contr... enter into with the mortgagee at the time give up his right of redemption or fetter it in any manner by confining it to a particular time, or a particular manner or a particular description of person. The doctrine of the Court of Equity on this subject is expressed by the maxim "once a mortgage, always a mortgage" which has been supplemented by the words of Lord Davey in the case of Nokes v. Rice (1902) A.G. 24 "and nothing but a mortgage'. It was held, "This, doctrine means that no contract between the mortgagor and mortgagee made at the time of the mortgage and as part of the mortgage transaction or in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage". Redemption is the very essence of a mortgage.

But the doctrine of redemption relates only to the dealings which take place between the parties to the mortgage at the *time* when the contract of mortgage is entered into, and therefore subsequently they are at liberty by a separate, distinct and indpendent contract to vary the terms of the original mortgage court act. But a Subsequent contract clogging the right of redemption entered into a few days later has to be proved by the mortgagee by circumstances that it is not a part of the original transaction. So circumstances alone and not a mere abstract principle have to be looked into as was held in *Kraglinget v. View Patagonia Meat* Co (1914) A. C. 25. The doctrine is applicable to all kinds of mortgage.

This relief of affording redemption even after the stipulated period, alone was not sufficient as the mortgagee designed such methods either to render the legal right to redeem illusory, or to defeat or clog the equity of redemption after it had arisen. So equity had to create subsidiary rules to invalidate the various contravance.

SPECIAL RULES AGAINST CLOGS ARE :

a. mortgage is redeemable.

b. Suspension of right to redeem

c. Clogs (Proper)

d. Collateral advantages,

a. Mortgage is always Redeemable :

Even as early as 1681 in New Comb v. Bonham it was laid down that no provision shall be made so as to make the mortgage irredeemable. In Fairc lough v. Swaa Brewery & Co (1912) A.C. 565 the security was lease with 210 months still to run and the mortgage was redeemed only by 209 monthly payments. Here the leasehold security was made irredeemable by the terms of the mortgage. So it was held that the mortgagor could give notice and redeem.

In Howard *v.Harris* it was held the provision that allowed redemption by the mortgagor, or his male heir was void and further held that and heir might redeem.

In *Salt v. Marquis of Northompton* (1892) A. C. 1. Insurance policies were mortgaged and the condition was that redemption confined only to the life time of mortgagor. It was held that the executor might redeem.

Coming to Indian cases, in *Kadir Bibi v. Maliappa Pillai* (1946) II M.L.J. 82 it was a usufructuary mortgage, which was made redeemable on the expiry of 3 years and 3 months. If the mortgage defaulted he could exercise his right only on 12th April of every year (i.e., 30th Punguni) so as not to hamper the cultivation or there should be on. redemption during cultivating season. Such a condition was held (1) not to be a clog, it being only reasonable notice, and (2) it is open to the mortagee to stipulate such clauses, where the parties are agricultural men.

b. Suspension of right to redeem :

A stipulation suspending the right to redeem may not make the right illusory and may not make it actually repugnant to the expressed right to redeem., yet it has a tendency, to defeat the right of redemption. But if the obligation is mutual i.e., the mortgagee could not call in his money during the period when the mortgagor was precluded from redeeming then the stipulation cannot be invalid. In *Knightsbridge Estate Ltd.,* v Byrne. (1939) Ch.441 an estate company mortgaged its free hold properties to the trustees of a friendly for a loan of £310,000. The agreement was the amount and interest should be in 80 half-yearly repaid installments and thus redemption was suspended for 40 years The corresponding obligation on the part of the mortgages lies, if the mortgages made no default in their installments and covenants, the money should be called only at the end of 80 half-yearly installments. The mortgagor wanted to redeem even before the expiry of the 40 years: Period as they were able to obtain money at a lower rate of interest.

The question that arose for decision was, whether the agreement for suspending the right for 40 years was valid? It was held (i) the covenant did not render the right to redeem illusory nor form part of and oppressive bargain between the parties in which case alone the court would interfere; (ii) only such a covenant is bad: (iii) the proposition, that suspension of right to redeem is permissible for a reasonable time is ill-founded; (iv) the covenant was in any way reasonable between the parties; (v) hence the mortgagors cannot redeem. This decision was confirmed on appear by the House of Lords, which held that these two companies had dealt with each other at arms lenth, so there is no oppression.

In the Indian case of Seth Ganga Dhar v. Shankar and others 1958 II M.L.J 150 it was held, "a term providing that the right to redeem will arise after 85 years does not of course take away the mortgagor's right to redeem: and is not therefore, in

that sense a clog on redemption. Whether it is a clog will depend on the circumstances of each case; whether it was extorted oppressively or by under influence. If the circumstances before the expiry of that period is premature".

c. Clogs (proper) :

A covenant, if imposes a penalty on the mortgagor on his failure to redeem on the contract date and which forms part of the contract of mortgage is termed as clog it is a check or an impediment on the right of redemption. The following have been held to be clogs :

1. An agreement restricting the equity of redemption to a particular class of persons.

2. A condition restraining the alienation during the subsistence of mortgage—Ram Ganesh v. Rup Narain. 3 All. 369 F.B.

3. A stipulation that the mortgagor is to redeem from out of his monies only and not by money raised by sale or mortgage of the property.

4. Agreement to convert mortgage into sale on default of payment. An Agreement entered into, at the time of entering into mortgage for the purchase of the property - Dharba Veera v. National Insurance Co. A.I.R. 1947 Mad. 51.

But it must be noted that the rule against clogging the equity of redemption does not invalidate subsequent and independent agreements between the mortgagor and mortgagee relating to the mortgaged property' The following have been held not be clogs:-

1. Condition for redemption of prior mortgages- Hari Prasad v. Ram Chandra. 44 All. 37. F.B.

2. A condition that the prior mortgage could be redeemed only after satisfying the subsequent mortgage by payment- Sheo Kumar v, Fittu Singh.

3. Long term in usufructuary mortgage-Jaganadham v. Venuhturupalli. A.I.R. 1944 Mad. 501. But if the long term were to work hardship to the mortgagor with no advantage then it will he a clog e.g.', the term is 99 years and the mortgagee has the right to put by any superstructure that he liked during that period, the two terms together were so unreasonable as to amount to a clog on redemption. Vedilal v. Gokalda A.I.R. 1953 Bom 408.

4. Granting of leases etc.

D. Collateral Advantages :

It is an additional advantage given or agreed to be given to the transferee apart from his right to get back the money advanced by him with interest. In England the law of collateral advantages passed through several stages:

First Stage	:	Jenning v. Ward (1705) 2 Veda 520.
Second Stage	:	Broad v. Selfe (1863) 11 W.R.
Third Stage	:	Biggs v. Hoddinott (1555)2 Ch.D. 307 Santley v. Wilde (1899) 3 Ch.D. 474.
Fourth Stage	:	Noakes v. Rice (1902) A.C. 24 Bradley v. Carritt (1903) A.C. 253
Fifth Stage	:	Kreglinger's Case : (1914) A.C.25

The law relating to collateral advantages can be stages as follows :

A stipulation which, being a term of a mortgage, se-

cures to the mortgagee an advantage outside his principal and interest is invalid if it (a) defeats or renders illusory the right to redeem under the first rule set out above, (b) is repugnant to the right to redeem under the second rule, (c) clogs the equity of redemption under third rule, or (d) forms part of a mortgage contract obtained oppressively or through undue influence.

When usury laws were in force, the maximum rate that could be charged by way of interest was prescribed. To prevent these laws being cricumvented the court of equity went beyond them and set its face against every transaction which tended to usury. It therefore declared void every stipulation by a mortgagee for a collaterally advantage which made his total remuneration for the loan indirectly exceed the legal interest. In *Jennings v. Ward*. Trevor MR held; a man shall not have interest for his money and a *collateral advantage besides* the loan of it, or *clog the equity of redemption* by any agreement. The mortgagor being under the control of the mortgages is not in a position to contract with the mortgagee on equal terms- So equity courts will regard every collateral advantage as an "oppressive one and not enforceable".

The *usury* laws were repealed in 1854, so the question was raised in *Broad v. Selfe* whether their repeal affected the law on this subject. Here the mortgagees stipulated for the collateral advantages of a bonus of 5% on the value of the property to be paid by the mortgagor when the debt was discharged. The mortgagors however tendered only the principle and interest and not the bonus. Held the tender perfectly valid, and the collateral advantage void.

In *Biggs, v. Hoddinott* redemption only after 5 years. The collateral advantage was that during the subsistence of the mortgage the mortgagor should buy beer only from mortgagees. When the mortgagor sought to buy the beer elsewhere a suit for injunction to restrain him was brought by the mortgages, Held that (i) 5 years in the circumstances was a reason-

able period for suspension of redemption. (2) the equity of redemption was not in any way clogged by a covenant which was operative only until redemption took place.

The law stated above was extended in *Santley v. Willde,* to the case of a collateral advantage continuing beyond the currency of the mortgage. Here the tenant of a theatre stipulated that she would in addition to the principal and interest even after payment of the same pay to the mortgagees besides 1/3rd of the net profit which she may derive by way of subleases for the entire duration of her lease which had another 10 years run, and also even after payment she agreed to keep the mortgage alive to secure the payment of the 1/3rd share of profit, it was held the collateral advantage to be perfectly valid as it was a business agreement between the parties.

But in *Noakes v. Rice* it was held that Biggs v. Hoddinott was correctly decided but not *Santley v. Wilde. In Noakes v. Rice* the tenant of a public house mortgaged his leasehold. The collateral advantage was that he was not to sell any other beer except that purchased from the mortgagees, during the rest of the lease period which had 26 years to run. The mortgage money was made repayable on demand by either side. Here it was held the Collateral advantage was a clog as the mortgagor cannot recover his security in fact and unimpaired by the mortgage" "the covenant turned a free public house into a tied house".

In *Bradaly v. Carritt,* the next decision of the House of Lords, the defendant was a share holder in a tea company. He mortgaged his shares to plaintiff, a tea broker. The collateral advantage was that the defendant should see that the tea company, continued to employ the mortgagee, as their broker. If the tea company ceased to employ him, then the mortgagor was liable to pay the commission he would have earned had he been employed. The mortgagee was paid and thereafter company changed their broker. The mortgagee brought action on breach of covenant.

The *Majority* view was (1) the covenant is a clog on redemption because the mortgagee retained control over shares; (2) the collateral advantage is another form of interest and it must come to an end when the principal sum is paid. The Minority view was that as it was a purely personal obligation was in no way affecting the subject of the security the obligation was entirely separable and separate from anything relating to the subject of security, which was the shares of the defendant and there is no reason for holding that the obligation is in any way invalid, more so as the covenant was purely personal to the mortgagor; and did not bind him to deal with the shares in any particular way.

This decision naturally evoked a great of critism because the result was under circumstances a collateral advantage can survive a redemption and which forms part of the mortgage deed.

In the fifth and last stage, which we may call the modern Stage, the decision in *Bradaly v, Carritt* was rejected by the House of Lords. In *Kreglinger v. Patagonia Meat and Cold Storage* Company, the mortgagors borrowed £ 10,000 at 6% interest from Kreglingers, a firm of wool brokers. The mortgage was for 5years and during subsistence of the mortgage all the sheep skins be sold only to the mortgagees, so long as they wore willing to buy at the end of the 2nd year and wanted to be relieved of their obligation to offer sheep skin to the mortgagee firm. It was held that the stipulation for the pre-emption formed no part of the mortgage transaction' and it was a collateral advantage entered into as a condition of obtaining a loan and that it created a perfectly valid and enforceable obligation.

The result of this decision is, a collateral advantage is valid provided; (i) it is not unfair; (ii) it is not penal or oppressive; (iii) it is not a clog, hampering the right of redemption.

... a law :

In Seth Ganga Dhar v.Shanker Lal and others, we have

already said that collateral advantages extending beyond the redemption of mortgages are not permitted in India, as statutory provisions of section 60, are to that effect, but the tendency of the courts is to favour *Kreglingers'* case.

Partial Redemption :

Last para of section 60, the provision says that a mortgage security is indivisible. That means a mortgage cannot be redeemed piecemeal A part-owner or purchaser of part equity of redemption cannot redeem his share alone whilst he can redeem the entire mortgage. This principle is laid down on the ground of expediency and convenience so that the mortgagee may not be driven to the necessity of filing separate suits against each and every one of the purchaser, who may purchase the property without his consent.

The law regarding partial redemption came to be considered by the Madras High Court in *Huthasanam Namboodri V. Parameswaran Nambiar* 22 Mad. 209. Here four items of property were mortgaged. The plaintiff purchased one of the items and sued for redemption of the entire property. It was entitled to do so because of the doctrine of partial redemption is intended to benefit the mortgagee by preserving the integrity of security. Subject to the rule of indivisibility it is open to the mortgagor, to redeem the entire property.

The Privy Council in Yulali Beg v Tukaram. 48 Cal. 22 P.C. laid down the law. Here several items of property was mortgaged to secure a single debt. One of the items was sold to X. Mortgagee filed a suit for foreclosure without impleading X, the holder of part of the equity of redemption. The foreclosure suit was compromised and the mortgagee became the owner of the entire property. X brought a suit for redemption of the entire mortgage on the ground that he is a co-mortgagor and that he is not bound by the compromise as he was not a

party to the foreclosure proceedings. *It was held* : (1) the purchaser could redeem the property because of the rule against partial redemption; (ii) the mortgagee could not enter into possessions by the act of others, without impleading one of the co-mortgagors.

EXCEPTIONS TO THE RULE OF PARTIAL REDEMPTION

Before 1929 :

Three exceptions were recognised

a) Where the mortgagee allows redemption of a share. A,B,C mortgage their (undivided) joint family property. Later they divided the property and if the mortgagee allow one of them to redeem his 1/3rd share then he must allow the others likewise to redeem this 1/3shares. Here the integrity of the mortgage is spilit owing to redemption by one of several co-mortgagors.

b) Release of a share by mortgagee. If mortgagors A,B,C mortgage their respective properties X, Y, Z to the mortgagee and the mortgagee releases X alone, then B and C can redeem Y and Z separately.

c) Acquisition by the mortgagee of a share in property by sale or inheritance. The integrity of the mortgage security is split and it is possible to have piecemeal redemption.

After 1929 by introducing the word "only. (see section "only" is put in italics) the third exception alone is recognised and so the law is that partial redemption is available only in cases where the mortgagee acquires a share in the security either by sale or inheritance etc. In such case there is a partial merger of the right of the mortgagee in the equity of redemption, a reduction of the debt on that portion of the property, hence the integrity of the mortgage debt is broken up,

'Right of Redemption' How Exercisable? :

After the mortgage money has become due before the right of redemption is extinguished, (either by operation of law or by act of parties) he has the following alternative remedies open to him:

1. To pay or tender the mortgage amount at a proper time and place: Section 60.

2. He may deposit the amount in Court; Sections 83 and 84.

3. File a suit for redemption; Section 91.

I propose to consider the first two remedies here and the third remedy in later lesson

Payment or tender of mortgage money :

i) There must be a payment or tender.

ii) Such payment or tender must be the mortgage amount.

iii) Such payment or tender must be made at proper time and proper place.

iv) Such a payment or tender must be made to mortgagee.

The tender must be unconditional and mere willingness on the part of the mortgagor will not amount to attender. A tender under a protest is a valid payment. The proper time is when the mortgage amount has become due. Any payment made prior to the due date therefore cannot constitute - valid payment. The tender should be made to the mortgages or a person deriving title under him. Where there are several mortgagees the tender should be made to all the mortgagees. The result of a valid tender is the interest stops from the date of tender. But where a tender has been properly refused it cannot constitute a valid tender and it cannot interest.

Deposit into court :

According to section 84, when the money is tended in the court, the interest ceases to run from the date of deposit, even after this if the mortgagee refuses he can file a suit for redemption and can deduct the interest from the date of deposit.

Essentials of a valid deposit :

(1) It must be unconditional (2) It must he made to the account of the mortgagee; (3) It must be made after the money has become due end before the right of redemption is barred. (4) The entire amount must be deposited.

Obligation to Transfer to Third Party Instead of Retransference to Mortgagor :

Section 60 A, which was introduced by the ending Act of 1929, says; "(1) Where a mortgagor is entitled to redemption, then, on the fulfillment of any condition is on the fulfillment of which he would be entitled to require are transfer, he may require the mortgagee' instead of retransfering the property to assign the mortgage debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign the transfer accordingly, (2) (3)

Under section 60, the right of the redeeming mortgagor is to require he re-transfer either to the mortgagor himself or to a third person. Under this section he may require the mortgagee to assign the mortgage to a third person. A puisne mortgagee, as assignee of a part of equity of redemption may redeem a prior mortgagee and exercise this right.

Right to Inspection and Production of Documents :

Section 63B, says "A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his own costs and on payment of the mortgagee's costs and

expenses on this behalf to inspect and make copies or abstracts of or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

Cases which denied this right of inspection are no longer good law after 1929 when section 60 B was introduced by the Amending Act of 1929.

Right to Redeem Separately or Simultaneously :

Section 61 was substituted by the Amending Act of 1929 for the original Section. It reads; "A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one of such mortgage separately, or any two or more of such mortgages together."

This section being the counter part of section 67 - A both dealing with the doctrine of consolidation - I propose to deal with this section when 67 A is dealt with

Right of Usufructuary Mortgagor to recover Possession :

Section 62 says in the case of an usufructuary mortgage, the mortgage has a right to recover possession of the property together with mortgage-deed and all documents relating to mortgaged property which are in the possession or power of the mortgagee.

a) Where the mortgage is authorised to pay himself the mortgage money from the rent and profits of the property. When such money is paid.

b) "Where the mortgagee is authorised to pay himself from such rents and profits or any there of a part only of the mortgage money, when the term (if any) prescribed for the payment of the mortgage-money has expired and the

mortgagor pay or tenders to the mortgagee money or balance thereof or deposits it in court as herein after provided.

It must be remembered that the right of a usufructuary mortgagor is not redemption but recovery of possession. That is the reason why the section does not use the word redemption.

Clause (a) :

Here the principal and interest are paid out of the usufruct and the suit is not for redemption but recovery of possession. The words 'when such money is paid" refers to payment out of the rents and profits. If the mortgagee files a suit for recovery of possession before the mortgagee recovers what is due to him from the usufruct of the property the suit is premature. But the mortgagor, may in equitable grounds, be allowed to redeem before the expiry of the term by reason of the conduct of the mortgagee, when there is any breach of covenant on the part of the mortgagee; otherwise when a term has been freed, a suit before the expiry of the term will not succeed.

Clause (b) :

Covers all the different classes of usufructuary mortgages. [Sec. 58 (d)] these are when the whole or part of the rents and profits are taken

i) In lieu of interest,

ii) In payment of the mortgage money,

iii) Part in lieu of interest and part in payment of mortgage money. Class (i) is covered by clause (a) and clause (b) covers classes (i) and (iii).

In class i) the interest is part of the mortgage money and the mortgagor is entitled' to recover possession when he tenders the balance of the mortgage money i.e., the principal. In

class (iii) part of the interest and the rest or part of the rest goes in reduction of the principal.

If no term is fixed and the debt is to be paid out of the rents and profits, the mortgagor would be entitled to possession when the principal was discharged out of the residue or part of residue of the rents and profits, if a term is fixed, on expiry of the term balance is ascertained and-paid.

Anomalous Mortgages :

Section 92 applies to usufructuary mortgages pure and simple and has no application to anomalous mortgages which contain a covenant to pay to anomalous mortgages section 60 applies.

Law Relating to Accessions and Improvements Sec. 63, 63A, and 70 :

During the subsistence of a mortgage, the estate either gets enlarged or increased in value, or an improvement is made upon the property, what are the relative rights of the parties i.e., of both the mortgagor and mortgagee to that accession or improvement is what has now to be considered- Section 63 and 63A deal with the mortgagor's right to these accessions and improvements while the mortgagee' right is dealt in section 70.

Section 63 deals with accession to mortgaged property. It says "Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession the mortgagor, upon redemption, shall in the absence of contract be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mort-

gagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property the mortgagor being liable in the case of an acquisition necessary to preserve the property from destruction, forfeiture, or selector made with his assent to pay the proper cost thereof, as an addition to the principal money with interest at the same rate as is payable on the principle or where no such rate is fixed, at the rate of nine percent per annum.

In the case last mentioned the profits if any arising from the accession shall be credited to the mortgagor.

When the mortgage is usufructuary and accession has been acquired at the expense of the mortgagee; the profits if any arising from the accession shall in the absence of a contract to the contrary, be set off against interest, if any payable on the money so expanded.

Section 63 :
A deals with improvement to mortgaged property. It lays down:

1) Where mortgaged property in possession of the mortgagee has during the continuance of the mortgage, been improver*, the mortgagor upon redemption, shall in the absence of a contract to the contrary, be entitled to the improvement: and the mortgagor shall not save only in case, provided for in sub - section (2) be liable to pay the cost thereof.

2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate

of nine percent per annum, and the profits, if any accruing be reason of the improvement shall be credited to the mortgagor".

Section 70 deals with the rights of the mortgagee to the accessions to mortgaged property. It says, if after the date of a mortgage any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purpose of the security be entitled to such accession". The illustrations to the section are :-

a. A mortgages to B a certain bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

b. A mortgages a certain plot of building land to B and after ward erects a house on the plot. For the purpose of his security B is entitled to the house as well as the Plot.

The general principle of the law is based on the principle *Accession credit principal* i.e.,. the accession or increase follows its principal. Therefore the general rule is, when an accession is made to the principal security it forms part of security.

As the rights of the mortgagee are much easier than that of the mortgagor, I shall discuss those and then pass on to the latter.

Mortgagee's Right ::

Section 70 Accession may be (1) increase by alluvion and (2) erection of a building. Such accession must be during the currency of the mortgage. But it need not be made personally by the mortgagor. In Nannu Mal v. Ramachandar 53 All 334 F.B. the purchaser of the equity of redemption erected a building and the question was whether that building was available to the mortgagee as part of his security. It was held that the mortgagee was entitled to this accession as part of his security, as it had merged in the principal security.

Mortgagor's Rights-Sections 63 and 64 A English Law :

The Law here is that borrowed from the English Law of Trust which was laid down in the case of Keech v. Sandford or Runtford *Market Case*. In this case an intent under a trustee was a lease for a certain market. The trustee applied for the renewal of the lease on behalf of the infant. The lessor objected. So the trustee took a lease himself. It was held because the benefit was accquired as a trustee, it ensured to the beneficiary. So the rule is where a person acquires and makes an improvement in a fiduciary capacity then alone it will become a part of the principal security.

Indian Law :

Section 90 of the Trusts Act lays down this rule : "Where a tenant for life Co-owner, mortgagee or other qualified" owner of property, by availing himself his position as such gains an advantage in derogation of the rights of other persons interested in the property, or where any such owner as representing all persons interested in such property gains any advantage, he must hold for the benefit of all persons so interested, the advantage so gained, but subject to the repayment by such persons of their due share of the expenses property incurred and to an indemnity by the same persons against liabilities property contracted in gaining such an advantage".

This principle of section 90 of the Trusts Act is applied to accessions regarding mortgaged securities. In *Sorabjee v. Dwarakadas* 38, L-A., 356 P.C, it was held; "When an acquisition is an accession made by the mortgagee for his own benefit, the mortgagor is not entitled to it except under the equitable rule enacted in section 90 of the Trusts Act. In other words the mortgagor must show that the mortgagee by availing himself of his position as such acquired the accession in derogation of the right of mortgagor" The facts of the case were the mortgagee became owner of 1/2 the mortgaged property by purchase of

the equity of redemption. He purchased two fields adjoining the mortgage property and erected a ginning mill. But the Privy Council rightly held that the mills and the 2 fields the mortgagee had acquired not in his capacity, as mortgagee and therefore the mortgagor was not entitled to them.

Accessions can be divided into 3 categories, and the mortgagor's right will depend upon the category of the category of accession to which it belongs.

Natural Accessions :

The maxim accessio credit principal will apply and it becomes a part of the mortgaged security e.g., accession by alluvion.

Acquired Accessions :

a) Separable :

The mortgagor is not bound to take them on redemption. But if he wants them, he must pay compensation to the mortgagee e.g., a stable, is severable. The mortgagee is entitled only to the actual cost and not its market value

b) Inseparable :

The mortgagor has no option but to take them but he is liable the pay compensation to them only if the acquisition was necessary to preserve the property from destruction or the acquition was made with the consent of the mortgagor. In such cases the mortgagor shall pay compensation with interest either at the contract rate or at 9% per annum if not contracted.

Improvements by Mortgagee - Section 63 A :

This section was introduced by the Amending Act of 1929. Before that the Act was silent as to improvements by mortgagee. On a reading of the section and comparing it with

section 63 you will note certain distinction. In this section no distinction is drawn between accessions capable of separate enjoyment and those not so enjoyable. The section also does not say anything about improvements made with the consent of the mortgagor.

Prior to 1929, there was a difference of opinion whether mortgagees were entitled to compensation for improvements.
One view was they were entitled to compensation if they were necessary repairs to the property. The other view that he was entitled provided the improvements were reasonable. This was based on the rule of English Law laid down in Sandan v. Hopper. "A mortgagee has no right to lay out money which he calls increasing the value of property which may be done in such a way as would make it utterly impossible for the mortgagor to redeem. In other words, a mortgagee cannot be allowed to improve the mortgagor out of his estate."

Based on this view section 63 A was introduced in 1929. The general rule is the mortgage cannot be compensated for the improvements made by him on the mortgaged property.

But three exceptions have been made :

1. Where it is necessary to preserve the property from destruction or deterioration,

2. Where it is necessary to prevent the security from becoming sufficient (section 66).

3. Where the improvement was effected in compliance with a order of a public authority.

The amount of compensation is the cost of improvement with interest at either the contract rate or 9% as the case may be "CONTRACT TO THE CONTRAY", This section can be invoked only when the mortgage deed is silent as to improvement.

Renewal o the Mortgaged Lease :

Section 64 Says The mortgaged property is leased, and the mortgagee obtains a renewal of lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease".

Section 65 A :

Confers on the mortgagor, while lawful possession of the mortgaged property, the power to make leases thereof which shall be binding on the mortgage. No such leases shall contain a covenant for renewal. The best rent obtainable shall be reserved; and no premium shall be paid or promised and no rent shall be payable in advance. This section is subject to a contract to the contrary.

Section 66 :

Deals with waste by mortgagor in possession It says, "A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate : but he must not commit any act which destructive of permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.